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No. 87-__

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

THE CONTINENTAL GROUP, INC.,
CONTINENTAL CAN COMPANY, INC.,
CONTINENTAL PACKAGING COMPANY, INC., and
KMI CONTINENTAL INC.,
Petitioners,
v.
CECIL MCLENDON, DON VANDERTULIP,
JIMMIE CARTHARN, JR. and KONRAD TROJNIAR,
on their own behalf and on behalf of all others similarly situated,
Respondents,
and
HONORABLE H. LEE SAROKIN,
United States District Judge
for the District of New Jersey,
Nominal Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Does the alleged complexity of a case excuse a court from preserving a party's constitutional right to a jury trial in an action that combines legal and equitable claims in a manner consistent with this Court's teaching in *Beacon Theatres, Inc. v. Westover?*

2. Does preservation of the constitutional right to a jury trial require fact-finding by a jury of common facts in an action involving legal and equitable claims before the court may make findings of fact as to the equitable claims?

THE PARTIES

This statement is submitted pursuant to Rule 28.1 of this Court.

CECIL McLENDON, DON VANDERTULIP, JIMMIE CARTHARN, JR. and KONRAD TROJNIAR, on their own behalf and on behalf of all others similarly situated.

THE CONTINENTAL GROUP, INC.,* a New York corporation incorporated in 1913; CONTINENTAL CAN COMPANY, INC., a Delaware corporation; CONTINENTAL PACKAGING COMPANY, INC., a Delaware corporation; THE CONTINENTAL GROUP, INC., a New York corporation incorporated in 1982; and KMI CONTINENTAL INC., a New York corporation.

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*The Continental Group, Inc. has been merged into Kiewit Continental Inc. whose parent companies are: Kiewit Holdings Group, Inc., Kiewit U.S. Co., and Peter Kiewit Sons' Inc. Subsidiaries (except wholly-owned subsidiaries) and affiliates of Kiewit Continental Inc. are: Altradec A.G.; Anlage-Und Handlesgesellschaft mbH; B.V. Handels-Maatschappij v/h Kortman; B.V. Leeuwenbrug; B.V. Metallwarenfabriek Drenthina; B.V. de Vereenigde Blik Fabrieken; bebo Plastik Verwaltungsgesellschaft mbH; bebo-Plastik GmbH & Co. KG; Beleggings-Maatschappij Zaandijk B.V.; Brasflor Commercio E Industria de Subprodutos de Madeira, S.A.; Braskraft S.A. Florestal E Industrial; CCL Industries, Inc.; CWC Leasing, Inc.; Cobelplast (U.K.) Ltd.; N.V. Cobelplast S.A.; N.V. Cobelplast Trading, S.A.; Continental Can Canada, Inc.; Continental Can Company of Europe B.V.; Continental Can European Industries, N.V.; Continental Can Hong Kong, Limited; Continental Can Leasing Company, Inc.; Continental Can Nigeria, Limited.; Continental Can Saudi Arabia, Ltd.; Convertidora Venezolana de Papel, S.A.; De Clerck N.V.; Dispack International N.V.; Dominguez & Cia. Caracas S.A.; Dominguez Continental, S.A.; Doosan Continental Can Manufacturing Co., Ltd.; N.V. Schuybroek S.A.; Elbatainer France S.a.r.l.; Elbatainer (U.K.) Ltd.; Elbatainer Kunststoff Und Verpackungsgesellschaft mbH; Europemballage B.V.; Europemballage GmbH; Extruplast A.G.; Fabrica Boliviana de Envases, S.A.; Flexopack, S.A.; Flextainer, S.A.; Industrias Del Norte, S.A.; Jeddah Beverage Can Making Co., Ltd.; La Societe Francaise de Developpement de la Boite-Boissons-SOFRED S.A.; Lubeca Maschinen und Anlagen GmbH; MPB Foliengesellschaft mbH; Maatschappij tot. vervaardiging Van "DUCATT" Verwarmings En Kookapparaten B.V.; Machinenverwertungsgesellschaft mbH; Metaalwarenfabriek Pielkenrood B.V.; Metalurgica Matarazzo, S.A.; Neidermeier Vermogensverwaltungs-gesellschaft mbH; P.T. United Can Company Limited; Philipp Neidermeier Metallwarenfabrik GmbH & Co. KG; Qualiplus USA, Inc.; RFG Recycling-Fordergesellschaft fur Getrankedosen mbH; SIA Handelsgesellschaft mbH; SLW-Versicherungsdienst GmbH; Schmalbach-Lubeca AG; Schmalbach-Lubeca Austria Ges.m.b.H.; Shellmar Comercio E Participacoes Ltda.; Shellmar Embalagem Moderna, S.A.; N.V. Sobemi; Tedeco B.V.; Tedeco GmbH; Tedeco S.a.r.l.; The Vinoxen Company, Inc.; Thomassen & Drijver Verblifa N.V.; Unicon Producing Company; Unterstutzungseinrichtung Schmalbach Lubeca-Werke

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GmbH; Verblifa N.V.; Wallace Trading Co., Inc.; Weduwe J. Bekkers B.V.; YRSU B.V. Excluded from this list are corporations in which Kiewit Continental Inc. or its subsidiaries or affiliates have less than 10% ownership.

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THE CONTINENTAL GROUP, INC.,
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and
HONORABLE H. LEE SAROKIN,
United States District Judge
for the District of New Jersey,
Nominal Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners, Continental Group, Inc., Continental Can Company, Inc., Continental Packaging Company, Inc., and KMI Continental Inc. (hereinafter "petitioner" or "Continental") respectfully petition that a writ of certiorari issue to review the order of the United States Court of Appeals for the Third Circuit, entered without opinion on November 18, 1987. The order denied the petitioner's request for a writ of mandamus to the District Court of New Jersey and to the Honorable H. Lee Sarokin. Petitioner sought a writ 1) directing the district court to vacate the opinion and order entered by the district court on

September 14, 1987, in *McLendon v. Continental Group, Inc.*, Civ. No. 83-1340 (as confirmed by the district court's order of October 15, 1987, denying the petitioner's motion for reconsideration of that order) and 2) directing the district court to hold a jury trial of all factual issues which are the factual predicates of both the legal RICO-based and the equitable ERISA-based claims in the action prior to a bench trial of the equitable ERISA-based claims, with the findings of fact by the jury to be controlling on the trial court. The petitioner requests that the Court review the Third Circuit's denial only as to the latter request.[1]

OPINIONS BELOW

The Third Circuit order denying the petitioner's request for a writ of mandamus is unpublished (section A of the Appendix). The district court orders and opinion complained of below have not been published (section B of the Appendix).

JURISDICTION

The order of the Court of Appeals was entered on November 18, 1987. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1) (1982).

APPLICABLE STATUTES

The seventh amendment to the United States Constitution provides that:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the

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[1] The failure to bring the other issue before this Court should not be deemed a waiver of that issue: petitioner plans to request an enlargement of those aspects of the district court's order in the immediate future; if the request is denied, petitioner will then consider whether it is appropriate to renew its petition for a writ of mandamus on that issue.

> United States, than according to the rules of the common law.

U.S. CONST. amend. VII.

STATEMENT OF THE CASE

The petitioner experienced significant reductions in workforce in the 1970s and early 1980s as changing technology and increasing levels of self-manufacture by customers reduced the demand for cans produced at many Continental plants. As a result a number of Continental plants closed and at other plants there was a significant reduction in the redundant workforce and a closing of redundant facilities.

The original complaint in the action for which the defendants sought a writ of mandamus from the Third Circuit was filed on April 15, 1983. The second amended complaint, filed on February 20, 1985 (section D of the Appendix) contains allegations that during the period of business decline and workforce reduction referred to above, Continental discriminated against certain of its employees, laying them off in order to prevent them from obtaining certain special additional pension rights known as Rule of 65 and 70/75 pension rights. Such "magic number" pension benefits are in addition to normal retirement benefits. Counts I (declaratory and injunctive relief) and II (damages) of the complaint assert that the alleged actions constituted a "pattern of racketeering activity," in violation of 18 U.S.C. § 1962(a) and (c) of the Racketeer Influenced and Corrupt Organizations Act (RICO). Counts III and IV allege that they constituted a violation of section 510 of ERISA, 29 U.S.C. § 1140.

The plaintiffs' second amended class action complaint asserted federal jurisdiction in the district court pursuant to the provisions of 18 U.S.C. § 1964 (RICO), 28 U.S.C. § 1331 (federal question); and 29 U.S.C. §§ 1132 (ERISA) and 1140 (ERISA).

In their second amended class action complaint, the plaintiffs have asserted that:

> [t]his action arises from an unlawful and fraudulent

> Capping Program initiated by defendant TCG-1 — a secret, computer assisted program designed to deprive defendants' employees of pension benefits under a pension plan, in violation of the Racketeer Influenced and Corrupt Organizations statute ("RICO") and the Employee Retirement Income Security Act of 1974 ("ERISA").

Appendix at A-20-21.

Count II of the second amended complaint which is titled "For Damages Caused by Defendants' Violations of Sections 1962(a) and (c) of RICO" requests "[t]hat each plaintiff and member of the class who has sustained damages as a result of defendants' unlawful conduct complained of herein receive judgment in the amount of threefold such damages." Appendix at A-39. Count IV, in parallel with Count II, is titled "For Damages Caused by Defendants' Violations of Section 510 of ERISA" and requests "[t]hat each plaintiff and member of the class who has suffered financial damage in whole or in part as a result of defendants' unlawful conduct alleged above receive judgment in the amount of such damage, including but not limited to backpay for all wages lost, for all pension benefits lost, and for all other employment benefits lost." Appendix at A-41. The complaint seeks recovery under RICO and ERISA for those who have sustained damages from the same set of actions. A bench finding that a plaintiff has suffered recoverable damages under ERISA will necessarily address the same facts that may give rise to a right of recovery under RICO.

Both parties, plaintiffs in their complaints, and Continental in its answer, requested a jury trial of all claims.[2]

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[2] It is well-established that there is a right to a jury trial for civil RICO claims, NSC *Int'l Corp. v. Ryan*, 531 F. Supp. 362, 363-64 (N.D. Ill. 1981) (action seeking treble damages under 18 U.S.C. § 1964(c) for persons injured by violations of RICO was legal in nature and that therefore the seventh amendment required a jury trial on demand); *Eisenberg v. Gagnon*, 564 F. Supp. 1347, 1353-54 (E.D. Pa. 1983) ("RICO creates a new legal wrong, for which 'the closest analogy is to an action in tort.' ") (quoting *Ryan*, 531 F. Supp. at 363); just as it appears to be generally accepted that there is no right to a jury trial for the kinds of ERISA claims made by the plaintiffs (*Calamia v.*

In May of 1987, the district court granted partial summary judgment for the plaintiffs on the ERISA counts. *McLendon v. Continental Group, Inc.*, 660 F. Supp. 1553 (D.N.J. 1987). Based on the Third Circuit's holding in *Gavalik v. Continental Can Co.*, 812 F.2d 834 (3d Cir. 1987), *petition for cert. filed*, 55 U.S.L.W. 3752 (U.S. April 6, 1987) (No. 86-1659), a case which concerned a single Continental plant (one specifically excluded from the scope of *McLendon*), the court held that defendants were collaterally estopped from rearguing:

> 1) that Continental developed and adopted a nationwide liability avoidance program as corporate policy; 2) that a determinative factor in that action was Continental's intent to deprive plaintiffs of Magic Number pensions.

McLendon, 660 F. Supp. at 1560.

Following the May summary judgment decision, plaintiffs submitted on June 18, 1987, proposed procedures for the continued litigation of both the ERISA and the RICO claims. Plaintiffs' proposal contemplated completing a non-jury trial of all remaining ERISA issues before conducting a jury trial on the RICO counts.

As set forth in Continental's July 6 Memorandum to Judge Sarokin, the proposed procedure would have prevented the case from being heard in the first instance by a jury. Continental raised its objections to the denial of a jury trial again at a conference held on July 28, 1987, and in a postconference letter to the court on August 14, 1987.

On September 14, 1987, Judge Sarokin entered an order very similar to that proposed by plaintiffs' counsel. The order denied Continental's request that the facts pertinent to both ERISA and RICO claims be tried before a jury in conformance with the parties' original requests for a jury trial. The pertinent portion of the court's order reads "ORDERED that the determination of the procedures to adjudicate plaintiffs' RICO claim

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Spivey, 632 F.2d 1235 (5th Cir. 1980); *Wardle v. Central States, Southeast* and *Southwest Areas Pension Fund*, 627 F.2d 820 (7th Cir. 1980), *cert. denied*, 449 U.S. 1112 (1981).

shall be deferred until after the initial trial of the ERISA claim." Appendix at A-5. At a subsequent hearing on October 2, 1987, the court clarified that the trial of the ERISA claim was to be a bench trial.

On September 24, 1987, counsel for Continental filed a "Motion to Reconsider, Modify, Clarify and Stay" Judge Sarokin's order of September 14, 1987. Section E of the Appendix. The motion argued, among other issues, that the order unfairly deprived Continental of a jury trial on all issues common to both the ERISA and the RICO claims. Appendix at A-44-45.

On October 15, 1987, Judge Sarokin denied Continental's motion for reconsideration. Section C of the Appendix. Continental filed a petition for writ of mandamus with the United States Court of Appeals for the Third Circuit on November 12, 1987. Section F of the Appendix.

Continental requested that the Third Circuit issue a writ of mandamus or other appropriate writ directing the Honorable H. Lee Sarokin, Judge of the United States District Court for the District of New Jersey, *inter alia*:

> 1. to vacate the opinion and order entered by the district court on September 14, 1987, in *McLendon v. Continental Group, Inc.*, Civ. No. 83-1340 (as confirmed by the district court's order of October 15, 1987, denying the petitioners' motion for reconsideration of that order);
> 2. to hold a jury trial of all factual issues raised in *McLendon* prior to any ruling by the trial court on the ERISA claims, with the findings of fact by the jury to be controlling on the trial court; and
> 3. to provide such other direction to the trial court as appears appropriate.

Appendix at A-60.

The writ was denied by the Third Circuit on November 18, 1987.

REASONS FOR GRANTING THE WRIT

This petition asks this Court to re-affirm the right to a jury trial under the seventh amendment to the United States Constitution, a cornerstone of the system of justice in this country. The Federal Rules of Civil Procedure have established a procedural framework for the efficient and just administration of the law in our federal court system. In so doing, the rules have created new circumstances in which the constitutional guarantees must be preserved. In these new circumstances, the federal courts, including this Court, have sought to ensure the preservation of such rights as the right to a jury trial. In particular, Rule 18, which allows the joining of legal and equitable claims in the same action, has raised significant practical issues about the proper method of fact-finding in circumstances where there is a role for both the court and the jury as finder of fact.

This Court has responded to these issues in a pair of decisions: *Beacon Theatres v. Westover*, 359 U.S. 500 (1959) and *Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1962). The petitioner now asks the Court to address 1) the refusal of the Third Circuit to follow the Court's teaching in these cases and 2) the conflict between circuits concerning the proper interpretation of these cases in actions where equitable and legal claims are joined.

I. This Court Should Grant Certiorari to Instruct the Third Circuit in Its Obligation to Respect the Right to a Jury Trial of Common Facts Where Equitable and Legal Claims Are Joined in the Same Action.

A. The Teaching of Beacon Theatres

This Court in *Beacon Theatres, Inc. v. Westover* found that the seventh amendment required that "*only under the most imperative circumstances, circumstances which in view of the flexible procedures of the Federal Rules we cannot now anticipate, can the right to a jury-trial of legal issues be lost through prior determination of equitable claims*." *Beacon Theatres*, 359 U.S. at 511 (emphasis added).

The important teaching of *Beacon Theatres* on the strength of the right to a jury trial has been affirmed in subsequent cases:

"Beacon Theatres requires that any legal issues for which a trial by jury is timely and properly demanded be submitted to a jury." *Dairy Queen, Inc. v. Wood*, 369 U.S. at 473. *See also GTE Sylvania, Inc. v. Continental T.V., Inc.*, 537 F.2d 980, 986 n.7 (9th Cir. 1976), *aff'd sub nom. Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977); *Amoco Oil Co. v. Torcomian*, 722 F.2d 1099, 1102 (3d Cir. 1983); *E.E.O.C. v. Corry Jamestown Corp.*, 719 F.2d 1219, 1224 (3d Cir. 1983). *Accord*, 9 C. Wright & A. Miller, Federal Practice & Procedure § 2338 at 134 (1971) ("[i]f, however, issues of fact are common to both the legal and the equitable claims and a jury has been demanded on the issues material to the legal claim, a jury must be permitted to determine these issues prior to decision of the equitable claim.")

In subsequent decisions, the Court has refined the broad policy statement of *Beacon Theatres* by identifying exceptions to the application of the policy, but none of the judicially articulated exceptions is pertinent to this matter. *See, e.g., Katchen v. Landy*, 382 U.S. 323, 336 (1966) (congressional intention to provide a procedure for expeditious determination of claims in bankruptcy without intervention of a jury constituted exceptional circumstance that took case out of *Beacon Theatres* doctrine); *United States v. Reynolds*, 397 U.S. 14, 18 (1970) (no jury trial available for eminent domain proceedings); and *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 337 (1979) (*Beacon Theatres* doctrine did not preclude equitable decision in one proceeding from having collateral estoppel effects in separate subsequent legal proceeding.)

The plaintiffs in the action have asserted that the decision of the Supreme Court in *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979) disposes of Continental's arguments for first holding a jury trial of issues common to the RICO and ERISA claims. A review of *Parklane* and *Katchen* (a case relied on in *Parklane*), demonstrates that those cases cannot be read to limit that right in the context of the present action. In *Katchen*, the same issues — whether a creditor has received a preference and, if so, its amount — were presentable either as equitable issues in the bankruptcy court or as legal issues in a plenary court. The petitioner argued that the bankruptcy court should stay its own proceedings and direct the bankruptcy trustee to commence a plenary suit so as to preserve petitioner's right to a jury trial. The Court rejected the petitioner's argument, finding that, in order to implement the congressional intent embodied in the Bankruptcy Act, the bankruptcy court could adjudicate the matter. The Court noted that:

> Both *Beacon Theatres* and *Dairy Queen* recognize that there might be situations in which the Court could proceed to resolve the equitable claim first even though the results might be dispositive of the issues involved in the legal claim.

Id. at 339.

In *Parklane*, the Court determined that the results of a *separate* equitable court proceeding could have collateral estoppel effects on a subsequent legal adjudication. The Court explained its finding as an extrapolation of its finding in *Katchen* that "an equitable determination can have collateral-estoppel effect in a subsequent legal action and that this estoppel does not violate the Seventh Amendment." *Parklane*, 439 U.S. at 335.[3]

The present action falls squarely in the territory that continues to be encompassed by the *Beacon Theatres* rule, the body of individual actions that include both legal and equitable claims arising from the same events. Thus, *Beacon* and its progeny require fact-finding by a jury of the matters common to the plaintiffs' ERISA and RICO claims before the court may adjudicate the equitable ERISA claims. The Third Circuit's apparent endorsement of the district court's order conflicts with this Court's teaching and should be reversed.

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[3] In opposing Continental's request for a jury trial first, plaintiffs have relied on dicta from *Parklane* which refers to the premise of *Beacon Theatres* as "a general prudential rule." 439 U.S. at 334. The case addressed the question of the collateral estoppel effects of an equitable determination on a subsequent separate legal proceeding, not a single proceeding with both legal and equitable claims. This Court has noted that "[i]t is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used." *Zenith Radio Corp. v. United States*, 437 U.S. 443, 462 (1978), quoting the decision below, 562 F.2d 1209 at 1213 (CCPA 1977), which in turn quoted *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 399 (1821).

B. The District Court Had No Discretion to Avoid a Jury Trial on the Basis of the Complexity of the Case.

As discussed above, the petitioner has asserted its right to a jury trial of the RICO counts first, invoking this Court's teaching in *Beacon Theatres* and its progeny. The trial court responded by arguing that the complexity of the case justified its action. Appendix at A-18.

As reviewed above, *Beacon Theaters* mandates that common issues be tried before a jury first. Moreover, a judge lacks discretion to deny a motion for a jury trial on the grounds that the issues involved are complex. *See generally* 5 J. Moore, Moore's Federal Practice ¶ 38.11[10] (2d ed. 1987). In *In re U.S. Financial Securities Litigation*, 609 F.2d 411, 429-30 (9th Cir. 1979), *cert. denied*, 446 U.S. 929 (1980), the Court declined to apply a "complexity test" to the right to jury trial in a complex securities case. The Third Circuit has ruled in *In re Japanese Electronic Products Antitrust Litigation*, 631 F.2d 1069, 1086 (3d Cir. 1980) that in exceedingly complex cases, a jury trial may in fact infringe upon due process rights to a fair trial. However, the court described the degree of complexity required as follows:

> It is not enough that trial to the court would be preferable. The complexity of a suit must be so great that it renders the suit beyond the ability of a jury to decide by rational means with a reasonable understanding of the evidence and applicable legal rules. . . . *Due process should allow denials of jury trials only in exceptional cases.*

631 F.2d at 1088 (emphasis added). Moreover, the court stated that the district court must "make explicit findings on the dimensions of complexity when it denies a jury trial in an action at law on grounds of complexity." *Id.* at 1089. *See also Cotten v. Witco Chemical Corp.*, 651 F.2d 274, 276 (5th Cir. 1981), *cert. denied*, 455 U.S. 909 (1982) (reversing trial court's denial of jury

trial on basis of finding that complexity of the case would make it "most difficult" for a jury to reach a rational decision).

The district court has not made any specific findings on the complexity of the present case, and if it were to do so would find itself far short of the standard in the Japanese electronics antitrust action. This Court has not to date found that there is a complexity exception to requirements of jury trials of the kind asserted by the district court here,[4] and no such finding is warranted in this action. On the one hand the district court judge found that in order to justify his decision to proceed first with adjudication of the ERISA-based equitable claims those issues were too complex for a jury but on the other hand found that the issues would not be too complex for a jury's consideration following the court's decision on the ERISA claims.

II. This Court Should Grant Certiorari to Resolve the Conflict Among the Circuits as to the Scope of the Constitutional Guarantee to a Jury Trial Under Beacon Theatres and its Progeny.

In the course of oral argument on July 28, and in a letter dated August 21, counsel for plaintiffs offered to "waive" any collateral estoppel effects which might result from trying the ERISA claims to the court prior to the trial of the RICO claims to a jury.[5]

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[4] The Court did note in *Dairy Queen* that, in instances made extremely rare by the powers given to the district courts under Fed. R. Civ. P. 53(b) to appoint masters to assist juries an action for accounting may be equitable, with no right to a jury trial, if the accounts between parties were so complicated that only a court of equity could unravel them. *Dairy Queen*, 369 U.S. at 478. Also, in *Ross v. Bernhard*, 396 U.S. 531 (1970), the Court noted that the determination of whether an issue were "legal" and thus triable to a jury depended on a number of factors, including "the practical abilities and limitations of juries." *Id.* at 538 n.10.

[5] It is not clear whether the district court adopted plaintiffs' offer as part of its rationale. The district court may have done so implicitly when it stated that defendants' rights to a jury trial would be preserved as to the RICO claims. Appendix at A-18.

Although collateral estoppel is an affirmative defense which must be asserted under Fed. R. Civ. P. 8(c), plaintiffs offered no support for the proposition that voluntary waiver of the preclusive effect of issues previously decided by a judge is sufficient to protect Continental's constitutional right to a jury trial.

If one accepted plaintiffs' "waiver," then the jury, in deciding the RICO claims, might conceivably arrive at findings of fact that are inconsistent with Judge Sarokin's bench findings as to the ERISA claims. Such inconsistent findings, under the district court's approach, would be allowed to stand (unless, of course, the district court were to change its findings following the fact-finding by the jury, a result which would make a mockery of traditional notions of judicial economy). Thus the premise underlying the court's order is that inconsistent fact-finding by a jury and by the court in an action involving both legal and equitable claims is legitimate and does not violate the petitioner's right to a jury trial as articulated in *Beacon Theatres* and its progeny. The circuit courts that have addressed the issue are in disagreement.

A. The Ninth Circuit Has Correctly Found that Under Beacon Theatres Preservation of the Constitutional Right to a Jury Trial Requires that Fact-Finding By a Jury Bind Fact-Finding by a Court in a Single Action with Legal and Equitable Claims.

The Ninth Circuit found that under *Beacon Theatres* the prior decision of the jury as to common facts will be *binding* on a court's subsequent equitable determination, thus ensuring consistent findings of fact. The Ninth Circuit in *GTE Sylvania*, a case involving both legal and equitable claims, found that:

> The trial judge's finding on this point appears to be in conflict with the finding of the jury that Maguire and Sylvania were not involved in any contract, combination, or conspiracy to enforce the location restriction. When issues common to both legal and equitable claims are to be tried together, the legal issues are to be tried first, *and the findings of the jury are binding*

> *on the trier of the equitable claims. Beacon Theatres v. Westover*, 359 U.S. 500, 79 S.Ct. 948, 3 L.Ed.2d 988 (1959). We therefore rely upon the findings of the jury if they appear to be inconsistent with findings of the trial judge.

537 F.2d at 986 n.7 (emphasis added).

B. The First and Third Circuits Have Improperly Limited the Reach of Beacon Theatres So As to Violate Parties' Rights to a Jury Trial.

Ignoring the problem of inconsistent determinations, the First Circuit has determined that a trial court can make determinations inconsistent with jury findings of fact in *Wallace Motor Sales, Inc. v. American Motor Sales Corp.*, 780 F.2d 1049, 1066 (1st Cir. 1985) and *Turner v. Johnson & Johnson*, 809 F.2d 90, 102 (1st Cir. 1986).

The Third Circuit by its order below has demonstrated that it finds the district court's order to be non-violative of the petitioner's right to a jury trial. Thus the circuit must be included among those that find inconsistent fact-finding acceptable under *Beacon Theatres*.[6]

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[6] This in spite of the fact that, as noted in the petition below, in *Weiss v. York Hosp.*, 548 F. Supp. 1048 (M.D. Pa. 1982), a case with both equitable and legal claims, the district court found that the jury's findings were binding on the court with respect to the Court's determination of entitlement to equitable relief. *Id.* at 1054. And on appeal the Third Circuit noted without comment that the court had adopted the jury's findings of fact "by which it considered itself bound" in determining whether or not to provide injunctive relief. *Weiss v. York Hosp.*, 745 F.2d 786, 792 (3d Cir. 1984), *cert. denied*, 470 U.S. 1060 (1985).

C. The Second Circuit Has Reached a Proper Conclusion Regarding Preservation of the Right to a Jury Trial While Noting that Its Conclusion Was Not Required by the Constitutional Imperatives of the Seventh Amendment.

In *Heyman v. Kline*, 456 F.2d 123 (2d Cir. 1972), *cert. denied*, 409 U.S. 847 (1972), an action involving both equitable and legal claims, the district court had denied the appellant's demand of a jury trial of legal claims. The appellee, as part of her response, agreed to waive any collateral effects of the lower court's equitable findings as to those claims to be tried by a jury if the case were remanded for such a trial. The Second Circuit first noted that such a waiver would allow subsequent *de novo* review of the legal claims at issue and that "no infringement upon the seventh amendment guarantee arguably would result from permitting the determination of the equitable claims to stand." *Id*. at 130.

The court then went on to point out that "among other things, the doctrine of collateral estoppel rests 'firmly on the need to avoid conflicting adjudications (involving the same parties). . . . If possible, the same parties should not be subject to conflicting determinations on the same point, both of which are binding.' " *Id*. at 131, citing *Armstrong v. United States*, 354 F.2d 274, 290-91 (Ct. Cl. 1965). The circuit thus found that, although the appellee might waive her right to collateral estoppel, the court also had an interest in the application of collateral estoppel. If it remanded for adjudication only of the legal claims it "would create a situation ripe with the possibility of inconsistent determinations of the same question." *Id*. at 131. The court concluded that it had to remand both legal and equitable claims for re-adjudication in the proper sequence of legal claims before equitable claims.

D. Review of the Second Circuit's Reasoning Demonstrates that the Constitutional Right to a Jury Trial in an Action Combining Legal and Equitable Claims Requires Fact-Finding by the Jury of Common Issues First With Such Fact-Finding Binding the Court's Fact-Finding as to Equitable Claims.

Although reaching a proper conclusion, the Second Circuit appeared to be unaware of the inherent contradiction between its observation that a waiver of preclusive effects might avoid improper interference with the constitutional right to a jury trial and its holding that the doctrine of collateral estoppel required the court to avoid circumstances in which inconsistent adjudication in the same case might occur. As discussed by the circuit, preservation of the integrity of the judicial process requires consistent adjudication. Thus, a party's waiver of the right to invoke collateral estoppel is insufficient; the court retains an interest which it may not abandon.

In a case where the court first makes findings of fact in adjudicating equitable claims, under the doctrine of collateral estoppel, the court will be required to limit subsequent fact-finding by a jury to those facts that it has not already found as trier of fact for the equitable claims. As the Second Circuit has noted in *Heyman*, even where a party is willing to waive collateral estoppel effects, the interest of the court in consistent adjudication remains and requires the court to apply such estoppel to avoid inconsistent adjudication. Thus, precisely the harm addressed by this Court in *Beacon Theatres* will occur if an order like that of the district court in this action is allowed to stand: following the court's fact-finding, collateral estoppel will preclude fact-finding by the jury of any facts determined by the court.

The Ninth Circuit in *Calnetics Corp. v. Volkswagen of America, Inc.*, 532 F.2d 674 (9th Cir. 1976), *cert. denied*, 429 U.S. 940 (1976), has followed *Heyman* in determining that even in the event of waiver of collateral estoppel effects of equitable determinations as to legal claims, it still would be compelled to remand for a consolidated trial of both kinds of claims "because of the threat of inconsistent determinations." *Id.* at 690 n.25.

III. Grant of a Writ of Mandamus Was the Proper Action for the Court of Appeals to Take.

Mandamus lies to preserve the constitutional right of the petitioner to a jury trial. Under the All Writs Act, 28 U.S.C. § 1651(a) (1982), the federal courts may issue writs "necessary or appropriate in aid of their respective jurisdictions." Mandamus is an appropriate remedy where the petitioner can demonstrate that he has "no other adequate means to attain the relief he desires." *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 35 (1980); *Kerr v. United States District Court*, 426 U.S. 394, 403 (1976). Moreover, the petitioner must establish that his right to issuance of the writ is "clear and indisputable." *Bankers Life and Casualty Co. v. Holland*, 346 U.S. 379, 384 (1953).

Mandamus was an especially appropriate remedy to address the district court's denial of Continental's right to a jury trial. *Beacon Theatres; Dairy Queen, Inc.; In re Union Nacional de Trabajadores*, 502 F.2d 113, 115-16 (1st Cir. 1974) ("In a civil case, there is no doubt that mandamus is appropriate if a jury trial is being wrongfully denied, even, it would appear, when the decision whether such right exists is a close or complicated one.") (writ subsequently recalled for other reasons); *Eldredge v. Gourley*, 505 F.2d 769, 770 (3d Cir. 1974) ("[A] writ of mandamus is an appropriate means of protecting the right to jury trial."); *Filmon Process Corp. v. Sirica*, 379 F.2d 449, 450-51 (D.C. Cir. 1967) ("[T]he Supreme Court expects the courts of appeals to make a determination whether or not there is a right of trial by jury, regardless of whether the question is a close or complicated one, and . . . the Court would not welcome a doctrine whereby a party's constitutional right to jury trial was trammeled in fact because a court of appeals determined that the issue was doubtful . . . .")

A writ lay to correct that portion of the order at issue before the circuit. The district court had exceeded its authority by issuing an order that denies the petitioner's right to a jury trial.

The order was an interlocutory order which may not be reviewed until entry of final judgment.[7] Thus, petitioner's had no other remedy and mandamus was appropriate.

IV. Conclusion

The improper denial of the petition for a writ of mandamus by the Third Circuit provides this Court with the opportunity to review important questions that have arisen in the context of the constitutional guarantee of the right to a jury trial. These questions should now be addressed by the Court because the order below constitutes an outright denial of the petitioner's constitutional right by the Third Circuit. The Third Circuit's denial arises from confusion among the circuits as to the proper method for guaranteeing the right in actions that involve both equitable and legal claims. This case provides a vehicle to the Court for resolving that confusion. The petitioner calls upon this Court to preserve and protect the constitutional right to a jury trial by clarifying the method to be employed by trial courts to preserve the right in cases such as the present one. Due regard for the constitutional guarantee should move the Court to accept this petition for *certiorari*, reverse the Third Circuit's order, and remand for action consistent with the reversal.

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[7] The denial effected by the district court's order was not subject to certification as an interlocutory order under 28 U.S.C. § 1292(b). The district court denied Continental's request for an initial jury trial with regard to RICO issues on the basis of its asserted *discretion* to do so in complex cases. *See* Appendix at A-18. ("Given the complexity of this matter, the court concludes that it possesses the discretion to proceed in this fashion, preserving Continental's right to a jury trial on the RICO claims.") Where the district court rules on the basis of its discretion, the "controlling question of law criterion" is not satisfied. *See generally* 9 Moore's Federal Practice, *supra*, ¶110.22[5] (2d ed. 1987).

Respectfully submitted,

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APPENDIX

Section A

United States Court of Appeals
for the Third Circuit

No. 87-5783

CECIL MCLENDON, et al,
vs.
THE CONTINENTAL GROUP, INC., et al, Petitioners
(NJ D.C. Civ. 83-1340) (SA)

Present: SLOVITER, MANSMANN, ROSENN, *Circuit Judges*.

Petition for Writ of Mandamus, prohibition or other appropriate relief.

Deputy Clerk 7-5019

ORDER

The foregoing Motion is denied.

By the Court,

/s/ Dolores K. Sloviter
Circuit Judge

Dated: 11-18-87
GT/cc:ELS
DV
Honorable H. Lee Sarokin

Section B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

CECIL MCLENDON, DON VANDERTULIP, JIMMIE CARTHARN, JR. and KONRAD TROJNIAR, on their own behalf and on behalf of all others similarly situated,	Civil Action No. 83-1340 (SA)
Plaintiffs	Hon. H. Lee Sarokin, Judge Presiding
v.	
THE CONTINENTAL GROUP, INC., a New York corporation incorporated in 1913; CONTINENTAL CAN COMPANY, INC., a Delaware corporation; CONTINENTAL PACKAGING COMPANY, INC., a Delaware corporation; THE CONTINENTAL GROUP, INC., a New York corporation incorporated in 1982; and KMI CONTINENTAL INC., a New York corporation,	ORDER
Defendants	

The court having entered a judgment on the issue of liability for the plaintiff class under Counts III and IV of the current Complaint, having in connection therewith ordered that this action shall now proceed to the remedial phase to determine appropriate individual and group relief, and having considered the entire record in this action.

IT IS this 14th day of September, 1987, hereby

1. ORDERED that in determining individual relief, individual class members must establish that they were

(1) non-vested employees eligible for 70/75 and/or Rule of 65 pension benefits,

(2) available for work,

(3) labeled (or designated) as permanently laid off by Continental, and

(4) laid off or continued on layoff status prior attaining eligibility for those benefits,

unless the plaintiffs shall establish a particular class member or members warrant a deviation from one or more of the foregoing four elements as to such member(s). Each person as to whom the said four elements (or any modifications thereof which the court may determine) are established shall be entitled to be made whole under Section 510 of ERISA, 29 U.S.C.A. §1140, for any loss or injury sustained, including the recovery of damages and the receipt of such other relief as may be appropriate, unless the defendants shall establish that, even in the absence of Continental's illegal liability avoidance plan (or program), that person would have been without work at the same time in any event. *See Gavalik v. Continental Can Co.*, 812 F.2d 834, 862 n.44, 866 (3d Cir. 1987). And it is further

2. ORDERED that within 45 days from the entry of this Order, plaintiffs shall provide to the court and defendants a list of the persons plaintiffs presently claim satisfy the four elements set forth above. This list may be supplemented by plaintiffs from time to time. And it is further

3. ORDERED that within 45 days from the entry of this order, plaintiffs shall provide to the court and defendants a list of the persons plaintiffs claim do not satisfy the four elements set forth above and the basis for their entitlement nonetheless. This list may be supplemented by plaintiffs from time to time. And it is further

4. ORDERED that within 75 days from the entry of this order with respect to all persons named in such list, defendants shall file and serve a written response stating the name, plant, last known address, clock number and Social Security number of any person on plaintiffs' list who defendants contend

(1) *does not satisfy any one of the four elements set forth above* [as to which persons defendant's aforementioned

response shall specify the element(s) they contend each such person does not satisfy, shall explain clearly and fully why the person does not satisfy the element(s) specified, and shall specify any documentary and testimonial evidence upon which defendants may rely in support of their contention as to that person];

> (a) If defendants contend that they cannot respond due to lack of information and such information is not within the possession of the defendants, as to such persons an affidavit shall be filed by such plaintiffs respecting such element or elements, unless plaintiffs can satisfy the court that such affidavits are unnecessary and said elements can be proved otherwise); and/or

(2) *would have been without work at the same time even in the absence of the aforementioned liability avoidance plan* [as to which persons defendants' response shall explain clearly and fully why each such person would have been without work at the same time even in the absence of the said plan and shall specify any documentary and testimonial evidence upon which defendants may rely in support of their contention as to that person].

In specifying testimonial evidence, defendants shall state the name, address and position of the witnesses upon whom they may rely, the basis of each witness's knowledge and a summary of the testimony the witness is expected to give. The summary shall be sufficient to clearly and fully inform the plaintiffs of the substance of defendants' factual contentions. Save for good cause shown and with leave of the court, defendants shall not be permitted to present evidence not disclosed to plaintiffs as required by this paragraph. In preparing their aforementioned response, defendants need not repeat as to each person a defense common as to more than one. Rather, they may disclose the common defense, the documentary and testimonial evidence which will support it, and the persons to whom they contend such defense applies; provided, however, that the response must clearly and fully inform plaintiffs as to the specifics of any defense defendants will offer as to each person identified in the list submitted by plaintiffs. Any person listed by plaintiffs as to whom defendants' response does not contain a contention that the person does not satisfy the four elements set forth above, or does not contain the information required by this Order to be set forth therein with respect to such contention, shall be deemed to have established the said four elements. Any person listed by plaintiffs as to whom defendants' response does not contain a contention that even in the absence of the said liability avoidance plan the person would have been without work at the same time, or does not contain the information required by this Order to be set forth therein with respect to such contention, shall be deemed not to be subject to any such defense. And it is further

ORDERED that the determination of the procedures to adjudicate plaintiffs' RICO claim shall be deferred until after the initial trial of the ERISA claim. And it is further

ORDERED that nothing contained in this Order is to be construed to preclude the resolution of any issues, whether they be group or individual issues, by summary judgment. In the event a motion for summary judgment is granted, or an order is entered under Fed. R. Civ. P. 56(d) specifying facts that appear without substantial controversy, the procedures set forth herein shall, where appropriate, be modified to be compatible therewith. And it is further

ORDERED that nothing contained in this Order shall be construed to curtail or limit discovery in any way, either in scope or in time. Discovery shall continue through the initial trial and until such time as it is terminated by separate order, And it is further

ORDERED that all parties and counsel are directed to cooperate with each other in all reasonable ways so as to see that the remaining discovery is carried out and the provisions of this Order are implemented fairly and expeditiously.

/s/ H. Lee Sarokin
H. LEE SAROKIN, U.S.D.J.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

CECIL MCLENDON, DON VANDERTULIP, JIMMIE CARTHARN, and KONRAD TROJNIAR, on their own behalf and on behalf of all others similarly situated,)
Plaintiffs)
)
v.) Civil No. 83-1340
)
THE CONTINENTAL GROUP, INC., a New York corporation incorporated in 1913; CONTINENTAL CAN COMPANY, INC., a Delaware corporation; THE CONTINENTAL GROUP, INC., a New York corporation incorporated in 1982; and KMI CONTINENTAL INC., a New York corporation,)
Defendants.) OPINION

SAROKIN, *District Judge*.

This court has held previously that Continental's adoption of a corporate "liability avoidance" program designed to reduce unfunded pension liability constituted a violation of §510 of ERISA. *McLendon v. Continental Group, Inc.*, 660 F. Supp. 1553 (D.N.J. 1987). *Gavalik v. Continental Can Co.* establishes the procedure for determining whether this classwide violation damaged any individual class members.

> In [the damage] proceedings, individual class members must first establish that they were (1) non-vested employees eligible for 70/75 and Rule of 65 benefits, (2) available for work, (3) labeled as permanently laid off by Continental, and (4) laid off or continued on layoff status prior to attaining eligibility for those benefits. Continental must then be afforded the opportunity to present evidence that as to any particular individual class member's request

> for relief, that individual is not so entitled because in the absence of Continental's illegal plan that individual would have been without work at the same time in any event.

812 F.2d 834, 866 (3d Cir. 1987).

Before the court is a motion for summary judgment on the issue of Continental's liability, under *Gavalik*, to 56 class members — 55 former employees of Continental's Passaic plant, and 1 former employee of Continental's Clearing (Chicago) plant. These plaintiffs contend that, as a matter of law, (1) they meet the four initial *Gavalik* criteria and that (2) Continental cannot establish that these plaintiffs would have suffered the same loss of work even in the absence of the illegal plan. The court denies plaintiffs' motion, but concludes, pursuant to Fed. R. Civ. P. 56(d), that certain material facts exist without substantial controversy.

DISCUSSION

I. Initial Gavalik criteria[1]

A. *Criterion 1 (pension eligibility) and 4 (lay off status)*

Plaintiffs present the affidavit of Whitman T. Soule, a statistical consultant who analyzed the computerized personnel data provided by Continental, in support of its contentions that the subject plaintiffs were nonvested employees eligible for magic number pensions (criterion 1) and that these plaintiffs were laid off or continued on layoff status prior to attaining pension eligibility (criterion 4).

---

[1] Continental argues that plaintiffs, prior to moving to the remedial proceedings contemplated by *Gavalik*, must establish that Continental's specific layoff decisions were motivated in part by a discriminatory purpose. However, plaintiffs have met their burden of causation as to liability by establishing that Continental's discriminatory intent was a determinative factor in the conduct constituting the classwide violation — development and adoption of the liability avoidance program. *See McLendon v. Continental Group*, 660 F. Supp. 1553, 1559 (D.N.J. 1987). Continental's argument is relevant to whether class members would have suffered the same loss of work in the absence of the program.

Continental presents no factual opposition to these contentions but challenges the Soule affidavit as conclusory. The court rejects this challenge and finds, pursuant to Rule 56(d), that no substantial controversy exists as to these two criteria.

B. *Criterion 3 (labeled as permanently laid off by Continental)*

Plaintiffs present the affidavit of Mr. Soule, its statistical consultant, stating that Continental assigned status code 249 or 299 to each of the subject class members. Plaintiffs contend that the assignment of these codes demonstrates, beyond factual dispute, that they were "labeled as permanently laid off." Plaintiffs rely on the Third Circuit findings in *Gavalik*, 812 F.2d at 840, as well as certain Continental documents, that indicate that a 249 or 299 status code constituted a label of "permanently laid off."

Continental submits evidence indicating that employees given these codes were not really "permanently laid off" and that this designation was for accounting purposes, not for the purpose of defeating plaintiffs' pension eligibility. Again, however, Continental misconstrues the initial requirement *Gavalik* imposes on plaintiffs. A plaintiff must show only that he was *labeled* as permanently laid off. Continental does not dispute that this labeling took place nor that these class members were nominally labeled as permanently "laid off." Continental's evidence is relevant to whether it can meet its burden of establishing that class members would have suffered the same loss of work even in the absence of the illegal plan.

The court finds, as a fact existing without substantial controversy, that the subject class members were "labeled as permanently laid off by Continental" under *Gavalik*.

C. *Criterion 2 (availability for work)*

Plaintiffs present alternative arguments that the subject plaintiffs were available for work within the meaning of *Gavalik*. First, 50 of the 56 subject plaintiffs argue that the fact that they were working at the time they were laid off establishes that they were available for work. Second, all of the subject plaintiffs present Continental documents[2] indicating that these plaintiffs received supplemental unemployment benefits (SUB) from Continental on August 22, 1979. Because the collective bargaining agreement requires a person receiving SUB to be "available for work," plaintiffs argue, Continental's payment of these benefits establishes plaintiffs' availability.

1. *Plaintiffs working at time of layoff*

Plaintiffs submit that the fact that an individual was working at the time of his designation as permanently laid off conclusively establishes that he was "available for work."

Continental responds that *Gavalik* requires that each plaintiff establish availability for work continuously from the date of layoff until the date of qualification for pensions. Additionally, Continental contends that plaintiffs, under their own theory of the case, must establish availability for at least five years after layoff — the amount of time necessary to destroy plaintiffs' recall rights under the labor agreements.

Continental's argument misconstrues the purpose behind the "available for work" requirement. *Gavalik* itself states only that class members must demonstrate that they were available for work, without mention of a time period. The purpose of the availability requirement is to show that each class member was damaged in some way by Continental's violation. Such damages could include lost wages, lost seniority, and among other things, lost Magic Number pensions. An individual who was working when laid off would have been available for work the next day, week, or month; the layoff, therefore, caused injury at least to the extent of lost compensation for that next day, week, or month. Continental's argument assumes incorrectly that lost Magic Number pensions are the only recoverable damages; to recover for such damages, a plaintiff may have to show that he was "available for work" for a longer period. However, evidence of availability for work for a single day is sufficient to establish that an individual was damaged in some fashion.

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[2] Plaintiff Konrad Trojniar presents a W-2 statement.

The court finds, as a fact existing without substantial controversy, that those plaintiffs who were actually working at the time of their layoff were "available for work" under *Gavalik*.

2. *Additional plaintiffs — not working at lay off*

As to any plaintiff not working at the time of lay off (or whose claim is for failure to recall), plaintiffs rely on Continental's grant of SUB to establish availability for work. Continental offers no factual evidence in response, but presents three reasons why summary judgment cannot be granted on this issue.

First, assuming receipt of SUB as conclusive evidence that plaintiffs were available on August 22, 1979, Continental contends that plaintiffs must show that they were available for work for the entire period until they qualified for Magic Number benefits. The court has rejected this argument above — plaintiffs satisfy *Gavalik* by demonstrating availability for work for the week including August 22, 1979.

Second, Continental argues that evidence that a class member received SUB is not trustworthy or admissible evidence that the class member was available for work. Eligibility for SUB is predicated on receipt of state unemployment benefits. Though recipients of state benefits must establish availability, this determination is made *ex parte* and is based solely on the applicant's statements. Although an employer may appeal the award of benefits, Continental argues that the lack of incentive to do so and the informal nature of the appeal have led some courts "to deny evidentiary weight" to the state decision. Continental argues further that its granting of SUB based on the receipt of state benefits is a ministerial act required by the labor agreements, and cannot be considered a decisive admission by Continental.

The court agrees that the receipt of SUB is not conclusive evidence of availability for work. Nonetheless, it is *competent* evidence as to this fact. An individual, by submission of such evidence, meets his initial burden, under Rule 56(c), of establishing that no issue of fact exists as to this issue. However, Continental's third argument against summary judgment is that, under Fed. R. Civ. P. 56(f), further discovery is necessary to ascertain facts essential to oppose plaintiffs' SUB evidence. Such facts are within the knowledge of the particular plaintiffs; Continental suggests that it should have the right to reasonable discovery of these plaintiffs to test the legitimacy of the SUB (and state unemployment) determination. See Affidavit of Edwin C. Thomas III (September 22, 1987), at ¶4.

The court agrees that Continental is entitled to further information from plaintiffs on this issue. The court, acting pursuant to Rule 56(f),[3] directs any moving class member relying on SUB evidence on this issue to submit an affidavit setting forth specific facts as to his availability for work. Continental, upon receipt of said affidavit, may specify, as required by Rule 56(f), any further discovery necessary to oppose plaintiffs' motion. The court counsels that depositions will be permitted only upon showing a basis to disbelieve a particular class members' affidavit. If, within 20 days of receipt of any such affidavit, Continental does not (a) specify, pursuant to Rule 56(f), what further discovery is necessary or (b) present, pursuant to Rule 56(e), specific facts showing a genuine issue for trial, the class member shall request that the court enter a finding, pursuant to Rule 56(d), that no substantial controversy exists as to that individual's availability for work.

II. "Same loss"

With respect to those plaintiffs who have established, beyond dispute, the four initial *Gavalik* elements, Continental has the burden of establishing "either collectively or individually that class members would have suffered the same loss of work even in the absence of the illegal plan." *Gavalik*, 812 F. 2d at 866. To prevail on this motion for summary judgment, these plaintiffs must establish that Continental cannot meet this burden, as a matter of law.

Plaintiffs fail to prove this negative. Continental presents evidence indicating that all layoffs in Passaic were the result of legitimate decisions made in the face of declining efficiency of the plant. Plaintiffs respond that such evidence is not sufficiently comprehensive and specific to establish that the layoff and non-recall of a particular employee would have taken place at the same time, even in the absence of the liability avoidance plan. However, Continental's evidence, if credited, indicates just that—that all Passaic employees would have been laid off, and not been recalled, for economic reasons.[4]

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[3] Rule 56(f) authorizes the court "to order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or [to] make such other order as is just."

Plaintiffs also submit the following argument:

> How can defendants purport to prove these individuals "would have suffered from the same loss of work even in the absence of the illegal plan" *if defendants contend, as they do, that there never was an illegal plan and that none of the plants was affected by such an illegal plan?*

Reply Brief in Support of Plaintiffs' Motion, at 11 (emphasis in original). Continental's position throughout this litigation has been consistent—the layoffs were made for legitimate economic reasons, not to avoid pension liability. Continental is entitled to assert this defense, while at the same time denying the existence or implementation of the plan.

The court finds that a genuine issue of material fact exists as to whether the subject plaintiffs "would have suffered the same loss of work even in the absence of the illegal plan." This finding precludes the entry of summary judgment for plaintiffs.

---

[4] Continental presents evidence that plaintiff Trojniar, from the Clearing (Chicago) plant, was laid off due to changes in the seniority system. Plaintiffs correctly point out that such evidence, even if credited, explains only why Trojniar was laid off before other employees and not why he was laid off at all or why he was not recalled. However, Continental does present evidence by affidavit that adverse economic conditions caused the lay offs (and prevented the recall) of workers at the Clearing plant. This evidence creates a triable issue of fact as to whether Trojniar would have suffered the "same loss."

CONCLUSION

The court denies plaintiffs' motion for summary judgment on the issue of defendants' liability to certain individual class members. However, the court, pursuant to Rule 56(d) finds that the following facts exist without substantial controversy:

1. The subject plaintiffs who were working at the time of their lay off have satisfied the four initial requirements imposed by *Gavalik*.

2. The other plaintiffs were non-vested employees eligible for Magic Number pension benefits, were labeled as permanently laid off by Continental, and were laid off or continued on layoff status prior to attaining eligibility for benefits. Furthermore, the court establishes the procedure described above for determining whether a finding that these plaintiffs were available for work should be entered.

/s/ H. Lee Sarokin
H. LEE SAROKIN, U.S.D.J.

Date: October 15, 1987

Original to Clerk, U.S. District Court

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Cecil McLendon, Don Vandertulip, Jimmie Cartharn, and Konrad Trojniar, on their own and on behalf of all others similarly situated,

Plaintiffs,

Civil No. 83-1340

v.

ORDER

The Continental Group, Inc., a New York corporation incorporated in 1913; Continental Can Company, Inc., a Delaware corporation; The Continental Group, Inc., a New York corporation incorporated in 1982; and KMI Continental Inc., a New York corporation,

Defendants.

This matter having been opened to the court on plaintiffs' first motion for summary judgment on the issue of defendants' liability to certain individual class members; and the court having reviewed the written submissions and heard oral argument; and for the reasons set forth in the accompanying opinion,

IT IS this 15th day of October, 1987, hereby

ORDERED that plaintiffs' motion for summary judgment is denied, and it is further

ORDERED that the following facts are found to exist without substantial controversy:

1. The moving plaintiffs who were on active work status at the time of their being assigned status code 249 or 299 were non-vested employees eligible for Magic Number

pensions, were labeled as permanently laid off by Continental, were available for work, and were laid off or continued on layoff status prior to attaining eligibility for benefits.

2. The remaining plaintiffs were non-vested employees eligible for Magic Number pensions, were labeled as permanently laid off by Continental, and were laid off or continued on layoff status prior to attaining eligibility for benefits. The court establishes the following procedure for determining whether a finding that these plaintiffs were available for work should be entered:

> a. Each plaintiff shall submit an affidavit setting forth specific facts as to his or her availability for work.
>
> b. Continental, within 20 days of receipt of each affidavit, shall (i) submit to the court, pursuant to Fed. R. Civ. P. 56(f), an affidavit specifying what further discovery is necessary to oppose plaintiffs' motion, or (ii) present to the court, pursuant to Fed. R. Civ. P. 56(d), specific facts showing a genuine issue for trial.
>
> c. The court, upon receipt of said submission, will determine whether, pursuant to Fed. R. Civ. P. 56(d), any substantial controversy exists as to that plaintiff's availability for work, and whether further discovery is necessary as to this issue.
>
> d. If Continental fails to make said submission, that plaintiff shall request that this court enter a finding, pursuant to Fed. R. Civ. P. 56(d), that no substantial controversy exists as to his availability for work.

/s/ H. Lee Sarokin
H. LEE SAROKIN, U.S.D.J.

Section C

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

MEMORANDUM OPINION AND ORDER

Re: *McLendon v. Continental Group*, Civil No. 83-1340

Continental moves for reconsideration of the court's September 14, 1987 order. The court denies Continental's motion.

At argument, Continental conceded that the procedure established in paragraph 4 of the order was workable as to the four *Gavalik* elements that each class member must establish. The court's decision on plaintiffs' first motion for summary judgment on the issue of defendants' liability to certain individual class members, issued today, should facilitate the process set forth in the order. First, given that decision, many class members will be able to establish some or all of these elements as facts existing without substantial controversy under Fed. R. Civ. P. 56(d). Second, the decision provides guidance as to the implementation of ¶4(1)(a) of the September 14 order. Specifically, if plaintiffs file affidavits pursuant to ¶4(a)(1), the parties should follow the procedures set forth in ¶2 (b-d) of the court's order dated today denying plaintiffs' motion for summary judgment.

However, Continental contends that, as to evidence of "same loss," the September 14 order is fundamentally unfair because it requires Continental to "lay out its entire case" within 30 days. The court finds that the order is not unfair in this regard. Continental has propounded its "same loss" defense, in different contexts, throughout this litigation. Continental has had the opportunity to prepare its defense for the past several years. Given this background, the court finds that the order — which gave Continental 75 days notice of its obligation — is not unfair.

Continental also contends that the September 14, 1987 order is unfair because "[i]t requires Continental to lay out its entire case as it presently exists and then freezes that case in place while plaintiffs have free reign to take their own discovery." Letter of Edwin C. Thomas, III (October 13, 1987), at 6. The order, however, does nothing more than provide a procedure for the pretrial exchange of evidence for the purpose of preparing for an orderly and efficient trial. The order provides that "for good cause shown and with leave of the court" Continental may present additional evidence not disclosed within the required period. This provision ensures that Continental's will not be unfairly "frozen in place."

Finally, the court rejects Continental's argument that the order, by requiring a bench trial of the ERISA claims prior to a jury trial of the RICO claims, violates Continental's constitutional rights. Given the complexity of this matter, the court concludes that it possesses the discretion to proceed in this fashion, preserving Continental's right to a jury trial as to the RICO claims. Continental has no constitutional right to a jury determination on plaintiffs' ERISA claims.

The court denies plaintiff's motion for reconsideration of the court's September 14, 1987 order. That order is modified to incorporate procedures set forth in the court's opinion and order, dated today, denying plaintiffs' motion for summary judgment.

SO ORDERED.

/s/ H. Lee Sarokin

H. LEE SAROKIN, U.S.D.J

Date: October 15, 1987
Original to Clerk, U.S. District Court
Copy to: All counsel

Section D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil Action No. 83-1340 (SA)

CECIL MCLENDON, DON VANDERTULIP, JIMMIE CARTHARN, JR. and KONRAD TROJNIAR, on their own behalf and on behalf of all others similarly situated,

Plaintiffs

v.

THE CONTINENTAL GROUP, INC., a New York corporation incorporated in 1913; CONTINENTAL CAN COMPANY, INC., a Delaware corporation; CONTINENTAL PACKAGING COMPANY, INC., a Delaware corporation; THE CONTINENTAL GROUP, INC., a New York corporation incorporated in 1982; and KMI CONTINENTAL INC., a New York corporation,

Defendants

JUDGE H. LEE SAROKIN

SECOND AMENDED CLASS ACTION COMPLAINT

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

CECIL MCLENDON, DON VANDERTULIP, JIMMIE CARTHARN, JR. AND KONRAD TROJNIAR, on their own behalf and on behalf of all others similarly situated, *Plaintiffs*	
v.	Judge H. Lee Sarokin
THE CONTINENTAL GROUP, INC., A New York corporation incorporated in 1913; CONTINENTAL CAN COMPANY, INC., a Delaware corporation; CONTINENTAL PACKAGING COMPANY, INC., a Delaware corporation; THE CONTINENTAL GROUP, INC., a New York corporation incorporated in 1982; and KMI CONTINENTAL INC., a New York corporation, *Defendants*	Civil Action No. 83-1340 (SA) SECOND AMENDED CLASS ACTION COMPLAINT

(As used in this complaint, defendant The Continental Group, Inc. incorporated in 1913 is referred to as "TCG-I" and defendant The Continental Group, Inc. incorporated in 1982 is referred to as "TCG-II.") For their complaint, plaintiffs state as follows:

Nature Of The Action

1. This action arises from an unlawful and fraudulent Capping Program initiated by defendant TCG-I — a secret, computer assisted program designed to deprive defendants' employees of pension benefits under a pension plan, in violation of the Racketeer Influenced And Corrupt Organizations statute ("RICO") and the Employee Retirement Income Security Act Of

1974 ("ERISA"). The Capping Program, which continues to be in force at the present date, has resulted in hundreds of members of the class herein having been unlawfully deprived of such pension and other benefits having a value of many millions of dollars.

This complaint consists of four counts, each of which is a class action on behalf of participants in the pension plan. Count I seeks declaratory and injunctive relief relating to defendants' violations of Sections 1962(a) and (c) of RICO. Count II seeks damages for defendants' violations of Sections 1962(a) and (c). Count III seeks declaratory and injunctive relief relating to defendants' violations of Section 510 of ERISA, 29 U.S.C. §1140. Count IV seeks damages for defendants' violations of Section 510.

Jurisdiction And Venue

2. This Court has jurisdiction of this action pursuant to the provisions of 18 U.S.C. §1964, 28 U.S.C. §1331, and 29 U.S.C. §§1132 and 1140. Each of the defendants resides and is found in this judicial district and many of the acts complained of herein occurred in this judicial district.

The Parties

3. (a) Until July of 1982, defendant TCG-I was a New York corporation with offices in Wayne, New Jersey, and facilities in many other states, and was an employer engaged in commerce within the meaning of 29 U.S.C. §1003(a)(1). Among these facilities were all of the plants affected by the aforementioned Capping Program, which said plants were operated by TCG-I from a date prior to 1975 continuously until July of 1982.

(b) In July of 1982, TCG-I was merged into defendant Continental Can Company, Inc., a Delaware corporation, which was the surviving corporation and a subsidiary of defendant TCG-II. On November 1, 1984, TCG-II merged with and into defendant KMI Continental Inc., a New York corporation which was the surviving corporation and is the successor corporation to TCG-II. Defendant Continental Packaging Company, Inc. is a

Delaware corporation which is a subsidiary of defendants Continental Can Company, Inc. and KMI Continental Inc. On information and belief, Continental Can Company, Inc. and Continental Packaging Company, Inc. have operated the plants affected by the Capping Program since some date in 1982.

4. TCG-I maintained at all times relevant herein until at least July of 1982, an employee pension benefit plan known as the Continental Pension Plan (the "Pension Plan") and other employee benefit plans within the meaning of 29 U.S.C. §1003, covering TCG-I's employees at many of its plants. The Pension Plan and the other employee benefit plans referred to are, and at all times have been, established pursuant to and required by collective bargaining agreements between TCG-I and United Steelworkers of America, AFL-CIO, as the collective bargaining representative of the beneficiaries thereof, including members of the class herein, and have been continued to be maintained to the present date by various of the other defendants.

5. Plaintiff Cecil McLendon is a resident of Clifton, New Jersey. He was actively employed by TCG-I, at its plant located in Passaic, New Jersey, for almost sixteen years until December of 1977, at which time he was laid off as a result of TCG-I's unlawful Capping Program. Mr. McLendon has never been recalled to work since then. He is a participant in the Pension Plan within the meaning of ERISA.

6. Plaintiff Don Vandertulip is a resident of Lodi, New Jersey. He was activiely employed by TCG-I, at its plant located in Passaic, New Jersey, for almost sixteen years until December of 1977, at which time he was laid off as a result of TCG-I's unlawful Capping Program. Mr. Vandertulip has never been recalled to work since then. He is a participant in the Pension Plan within the meaning of ERISA.

7. Plaintiff Jimmie Cartharn, Jr. is a resident of Chicago, Illinois. He was actively employed by TCG-I, at its Clearing plant located in Chicago, Illinois for eighteen years until December of 1980, at which time he was laid off as a result of TCG-I's unlawful Capping Program. Mr. Cartharn has never

been recalled to work since then. He is a participant in the Pension Plan within the meaning of ERISA.

8. Plaintiff Konrad Trojniar is a resident of Hinsdale, Illinois. He was actively employed by TCG-I, at its Clearing plant located in Chicago, Illinois for nineteen years until December of 1978, at which time he was laid off as a result of TCG-I's unlawful Capping Program. Mr. Trojniar has never been recalled to work since then. He is a participant in the Pension Plan within the meaning of ERISA.

The Class Herein

9. Plaintiffs bring this action on their own behalf and on behalf of a class consisting of all participants in the Pension Plan who suffered or will suffer a break in pension service subsequent to December 1, 1977 as a result, in whole or in part, of the Capping Program, but excluding persons whose break in pension service occurred while they were employed at one of the following plants: West Mifflin, Pennsylvania (numbers 72 and 478); Los Angeles, California (number 11); or Fairfield, Alabama (number 411).

10. (a) The class is so numerous that joinder of all members is impracticable. There are questions of law and fact common to the class. The claims of the representative plaintiffs are typical of the claims of the class and the plaintiffs will fairly and adequately protect the interests of the class. A class action is the most appropriate method for the adjudication of the controversy herein.

(b) The prosecution of separate actions by individual members of the class would create a risk of inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the parties opposing the class, or adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of other members not parties to the adjudications or substantially impair or impede their ability to protect their interests.

(c) The defendants have acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

(d) The questions of law and fact common to the members of the class predominate over any questions affecting only individual members, and a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

The "Rule Of 65" and "70/75" Pensions

11. In addition to normal retirement pensions, the Pension Plan provides for two types of pensions which are central to this action: the Rule of 65 and and 70/75 pensions, sometimes referred to as "Magic Number" pensions.

12. An employee becomes eligible for a Rule of 65 pension if (a) on the last day worked the employee has twenty years of active service and (b) at any time within two years of the last day worked the employee's age and years of service total or exceed sixty-five.

13. An employee becomes eligible for a 70/75 pension if he satisfies either of two alternative age and service requirements at any time within two years of his last day worked: (a) if he is fifty or older, has service of at least fifteen years and his age and service total seventy or more; or (b) at any age, with at least fifteen years of service, and his age and service total seventy-five or more.

14. An employee may not elect to take a Magic Number pension on the basis of age and service alone. Rather, an employee becomes eligible for such a pension only when his pension service breaks because the employee is laid off for two years or loses his job because of a plant closure.

15. Magic Number pensions provide an important benefit to participants for two reasons. First, a participant receives his lifetime benefit at an earlier age, and hence for a longer period, than does a participant retiring at age 65. Second, in addition to his monthly pension, a participant receives a special monthly

supplement of $365 until he reaches age 62 or, in the case of Rule of 65 pensioners, earns sufficient income to trigger a suspension of the supplement.

16. TCG-I's interest in preventing Magic Number pensions arose in part from the fact that providing these pensions costs more than providing a normal pension and neither TCG-I nor any other defendant has set aside funds to pay these pensions. The obligations to pay these pensions, therefore, constitute unfunded pension liabilities.

Defendants' Conduct Complained Of

17. In order to drastically minimize the number of Magic Number pensions it would have to pay, TCG-I, prior to the class period herein, devised and began to implement an unlawful scheme, the Capping Program, to effect the layoff of employees who were close to satisfying, but who had not yet satisfied, the age and years of service requirements for a Magic Number pension. The Capping Program referred to here has sometimes been referred to as the cap and shrink program, to encompass the two facets of the program: First, a plant is "capped," meaning that the number of employees at the plant is fixed at a level which is based in whole or in part on employees' eligibility or approaching eligibility for a Magic Number pension, and employees below the cap line (which is a seniority line) are laid off; then the number of employees at the plant is allowed or made to shrink even further either through natural attrition or other causes.

18. This scheme was devised and has been implemented in secrecy and did not become known to plaintiffs until shortly prior to the commencement of this lawsuit.

19. Operating out of a central office and utilizing an elaborate, computerized system to gather age, length of service and other data relevant to eligibility for a Magic Number pension, TCG-I and other defendants have effected hundreds of layoffs and taken numerous other actions to implement the Capping Program, with the intended result that the plaintiffs and hundreds of members of the class herein who otherwise

would have become eligible for Magic Number pensions could not become eligible for such pensions. These class members, as well as numerous other class members, have also sustained other damages resulting from the Capping Program.

20. Moreover, while these laid-off employees were supposed to be eligible for recall if and when job openings occurred, and while these laid-off employees believed they were eligible for recall, unbeknownst to them TCG-I had secretly determined that they were permanently laid off and would not be recalled, and their employment records were so marked. In the event that any of the affected plants inadvertently recalled an employee who had been laid off pursuant to the Capping Program, the aforementioned centralized computer system would issue a "red flag" alert, which would be sent to the employee's plant and would result in the employee promptly being laid off again so as not to allow him to satisfy eligibility requirements for a Magic Number pension.

21. (a) The layoffs of plaintiffs McLendon, Vandertulip, Cartharn and Trojniar are illustrative of the unlawful victimization of defendants' employees by the Capping Program.

(b) Mr. McLendon was laid off in December of 1977. At that time he was 49 years of age, had almost sixteen years of service with TCG-I and needed only an additional year and a half of active service to satisfy age and years of service requirements for a Magic Number pension.

(c) Mr. Vandertulip was laid off in December of 1977. At that time he was 44 years of age, had almost sixteen years of service with TCG-I and needed only an additional three years and two months of active service to satisfy age and years of service requirements for a Magic Number pension.

(d) Mr. Cartharn was laid off in December of 1980. At that time he was 38 years of age, had eighteen years of service with TCG-I and needed only an additional two years of active service to satisfy the age and years of service requirements for a Magic Number pension.

(e) Mr. Trojniar was laid off in December of 1978. At that time he was 38 years of age, had nineteen years of service with TCG-I and needed only an additional two years of active service to satisfy age and years of service requirements for a Magic Number pension.

22. On information and belief, the aforesaid unlawful conduct is continuing at the present time under TCG-I's present successor, defendant KMI Continental Inc., and will continue hereafter unless enjoined by this Court. Plaintiffs and other members of the class herein do not have an adequate remedy at law and will suffer irreparable injury unless such conduct is enjoined.

COUNT 1

[For Declaratory And Injunctive Relief Relating To Defendants' Violations Of Sections 1962 (a) And (c) Of RICO]

23. Plaintiffs repeat and reallege paragraphs 1-22. That the aforesaid fraud committed by defendants was knowing and willful is shown by, among other things, the following facts:

(a) *Continental's Strategic Plan*. In a confidential document entitled "CCC-USA* Strategic Plan 1978-1982," prepared by executives of TCG-I in 1977, TCG-I's business strategy for the five-year period 1978-1982 was set forth. One of the major aspects of this strategic plan was the reduction of pension liabilities. Among the objectives and programs set forth in the said documents were the following:

> "Minimize employee pension liabilities which could be triggered in a declining or unprofitable business."

* * * * *

> "Improved labor force management and control of employee benefits through implementation of the Bell Systems and the new MCR-55."

In a section entitled "Control of Employee Benefits," the said document stated:

---

* "CCC-USA" refers to Continental Can Company-USA, the unit of TCG-I which contained the plants involved here at various times.

> "Employee benefits are not escapable costs; however, they can be managed down to a lower aggregate expense with good workforce scheduling recognizing the effect of the benefit costs. This requires an intimate knowledge of the individual benefits and what tradeoff alternative costs will be at different manning levels. *This is particularly important in plants which will be capped and shrunk.*" (Emphasis added.)

The underscored sentence just quoted is a reference to the Capping Program. The same document discussed two programs which focused on the problems of TCG-I's pension liabilities. One of those was entitled "Plant Utilization Progam," usually referred to as PUP. The document describes PUP as follows:

> "A fundamental part of CCC-USA's strategy involves the concentration of business into a facilities base which will be efficient and fully utilized. This will involve shutting down surplus facilities where it can be done economically; *otherwise reductions will be accomplished by capping the workforce and shrinking the plants short of the point at which major 70/75 or 75/80 liabilities are triggered.*
>
> *Examples:* 70/75 = 50 years old plus 25 years service. 55 years old plus 15 years service.
>
> A major objective of PUP is to reduce or avoid massive liabilities which will otherwise effectively mortgage our business.
>
> The work force management program is designed to accomplish two objectives:
>
> 1. Avoid incurring future liabilities by capping the work force.
>
> 2. Avoid triggering existing liabilities by continued employment of vested 70/75 and 75/80 workers." (Emphasis added.)

(b) *The Bell Systems.* The document referred to above ("CCC-USA Strategic Plan 1978-1982") discussed at length the

"Bell Systems" referred to in the second quotation set forth in the preceding subparagraph. Those systems, which are referred to therein as Bell I and Bell II, are the "elaborate, computerized system" referred to in paragraphs 19 and 20 above. The said document states:

> "The Bell II system will also automatically monitor our capped plants, in order to assure that our liability avoidance program is taking place as planned."

The "liability avoidance program" referred to in this sentence is the Capping Program. In a confidential report prepared by executives of TCG-I and transmitted to other executives of TCG-I in July of 1977 under a memorandum stating that it is "the explanatory report of the bridge from Bell I to Bell II," the following was stated:

> "2. *Bell I — Management of Unfunded Pension Liabilities*
>
> The Bell System has enabled CCC-USA to describe our unfunded pension liabilities and develop a strategic approach to avoiding future exposures while at the same time securing the employment of those employees in which the vast majority of the unfunded liability is vested. The strategic plan implementation represented by the shrinking and capping of high liability locations has forced the line management to review many of its traditional approaches to managing the plant's work force. The restraints of restricted employment not only will serve to limit our future unfunded liabilities but will cause the manager to more effectively utilize all employees.
>
> 3. *Bell II-Managing Within a Capped Workforce*
>
> In a capped situation, our manning latitude is limited to a specific point on the seniority roster. Beyond that point no recall can take place as recall will reinstate the employee's continuous service thereby preventing future liability avoidance.
>
> In these situations, the employees available to man the plant dwindles with attrition. The constantly decreasing

> manning must be adhered to — no hiring or recall. We must work within this maximum to provide the manning needed to run our operations and provide for the required temporary employees (Float) to support vacations, EEP's, sick leaves, and the like. This represents a departure from the past where most of our locations needed only to adjust their manning to fit the available business at any given point in time. We now find it necessary to begin thinking about fitting the business to the available manning. We have found that many of the manning techniques which have always been a part of good management practice are a *must* if we are to service the available and profitable business.
>
> In short, we need to identify, analyze and implement those changes to our manning practices and our business selection and servicing which allow the maximum realization of profit in our capped locations.
>
> In 1976 and 1977 each business division determined the best positioning of assets in order to gain the highest return at the least exposure to increased unfunded liability. The plans were developed considering a vast range of alternatives for each business. Each plan was presented to upper management and approved as a proper approach to improve competitiveness and insure the longevity of a secure business.
>
> The next phase was plan implementation in the approved time frame with a minimum of disruption to the business. Cap implementation is the effecting of a liability avoidance plan and, in most cases, must stay in place for five years, due contractual requirements. After 5 years, the situation must be re-evaluated since, in essence, we would have a new plant situation without the previous liabilities."

An untitled document produced by TCG-I calls the Bell System the "backbone of the Strategic Plan" and states:

> "Our success in restricting the growth of unfunded liabilities is attributable to the intentional reduction of our workforce."

One of the chief purposes of the Bell System was to gather and utilize demographic data on the age and service of TCG-I's employees.

The July 1977 confidential report referred to above contains the following statements concerning "a liability avoidance tracking system called 'Red Flag,' " which is referred to in paragraph 20 above:

> "5. *Liability Avoidance Tracking (Red Flag)* On 4/1/77 a liability avoidance tracking system called 'Red Flag' was made operational and now runs each week as part of the weekly payroll run. This tracking system is the first Bell computer application which deals with the hard problems of plan implementation. It is designed to monitor the caps we have in place and track our progress toward installing future caps. The system will automatically generate reports when employees designated as permanently laid off are in fact brought back to work."

(c) *The "Two Fundamental Principles" Of The Capping Program*. Much earlier, in May of 1976, Stephen Rexford, an executive of TCG-I, sent a confidential report dated 5/10/76 to eleven other executives of the corporation. Among other things, the document stated:

> "*Liability Avoidance*
>
> There are two fundamental principles contained in the concept referred to as avoidance. First, we must be very careful that our plans make every attempt to avoid, insofar as practicable, triggering liabilities already vested in 70/75 qualified employees. Secondly, we must, whenever appropriate, shrink and cap our work forces in order to prevent currently inexpensive D.V.B.'s from migrating into the very expensive 70/75 category. These two concepts of avoidance can be mutually competing objectives. In order to put a tight cap on a particular plant, it may be necessary to place 70/75's on permanent layoff in order to prevent a large group of D.V.B.'s from migrating into the 70/75 category."

The reference to "D.V.B.'s" is a reference to employees who had achieved deferred vested pension benefits. The same document later states:

> "*Capping*
>
> Capping is a term used to describe the process of combining an activity level with an employment level (with float) within which the plant must operate for at least two years and, depending on the service of the employees on layoff — perhaps five years, without ever recalling employees from layoff. As employees who attrite from within the cap, it may be necessary to reduce the activity level so that the caps will be sustained. Caps are very difficult to put in place due to float requirements, seniority, skill balance, etc. However, once in place for a short period of time, the caps' value will become apparent. As no hiring takes place during at least the first two years, a gap will develop in the work force. Even if the business recovers and hiring takes place, there will always be a gap in the scattergraph for that plant. These gaps will provide future logical shrink and shutdown dates."

Capping has also been defined by TCG-I as follows in the untitled document referred to in subparagraph (b) above:

> "Once the optimal level of *future unfunded liability avoidance* is determined, we place a cap on the level of active employment. The cap also has the effect of removing a percentage of the workforce from active status to layoff."

(d) *The Alteration Of Marketing Decisions And Other Business Conduct To Fit The Capping Program*. TCG-I radically altered its marketing decisions, production locations, management considerations and other business conduct to fit the Capping Program. For example, the "Strategic Plan" referred to above stated that the corporation would have to "coordinate marketing decisions with employee liabilities." Similarly, the July 1977 confidential report referred to in subparagraph (b) above stated that "established business may be lost" because of the Capping Program. Numerous techniques were developed to manage business opportunities under the Capping Program, including "plant sizing," as described in the July 1977 confidential report referred to above:

> "This technique merely reflects the shifting of volume between potentially high liability operations and those in which liability potential is low and will remain low for a reasonable period of time. . . ."

A 1978 document prepared by a TCG-I executive and entitled "Authorization to Shrink Plant #5 Clearing" discussed the transfer of operations between plants because of the Capping Program:

> "This PUP proposal involves the cap and shrink of the Clearing Plant. The program will minimize the long-term employee liability of Clearing and will involve the transfer of several operations to other facilities."

Numerous other business decisions were made so as to effectuate the Capping Program, including the following: TCG-I, often had its employees work overtime, sometimes enormous amounts of overtime, to compensate for the employees who had been laid off under the Capping Program. For example, employees at the Clearing, Illinois plant often worked seven days a week commencing some time in 1980. TCG-I also changed its vacation policies, sometimes in direct violation of the applicable collective bargaining agreement, so as to better implement the Capping Program. At the Baltimore Plant, for example, employees were entitled to vacation upon demand, but TCG-I refused such requests if such a vacation would require the recall of an employee laid off under the Capping Program. At many plants, the company switched to "shutdown vacationing," meaning that an entire plant or department would be shut down and all employees would be forced to take their vacations during the shutdown. Prior to the initiation of the Capping Program, employees could choose the time of their vacations. At various plants, the company posted or otherwise indicated there were job openings, but would not fill the opening if the only applicants were employees laid-off below the cap line.

(e) *The Intentional Concealment Of the Capping Program.* TCG-I intended to and did keep the Capping Program secret from its employees. David Hull, who was at one time a plant manager for TCG-I, has testified under oath in another proceeding that the company did not want the employees to know about the Capping Program or the Bell System.

(f) *The Negotiation Of The Rule Of 65 Pension.* The Rule of 65 pension benefit first became a part of TCG-I's pension program in the Continental Pension Plan which became effective on November 1, 1977. The company-union negotiations which led to the inclusion of the Rule of 65 pension began in October of 1977. As the facts alleged above show, well before the negotiations for the Rule of 65 pension took place, the Strategic Plan, PUP, Bell System and Capping Program were all in place and the company was aleady committed to and implementing the secret and intentional reduction of its workforce for the purpose of minimizing its unfunded liabilities generated by any Magic Number pensions. The company did not disclose to the union, at any time during the negotiations, the existence of the Strategic Plan, PUP, the Bell System or the Capping Program. The existence of these was unknown to the union and to the employees they represented. At the time of the said negotiations, at the time of the execution of the collective bargaining agreement which resulted therefrom and first contained provisions for the Rule of 65 pension, and at all times thereafter, it was and has been TCG-I's intention not to comply with such provisions but, rather, to deprive as many of its employees as it could of their Rule of 65 pension rights by the implementation of the unlawful, fraudulent Capping Program. This has also been the intention of the other defendants.

(g) *The Capped Plants.* A TCG-I document dated May 9, 1980 states that as of that date the Capping Program had been put into effect at the following nineteen plants: Houston (No. 38), Clearing (No. 5), Stockyards (No. 51), Baltimore (No. 16), Patterson (No. 48), Pittsburgh (No. 72), Birmingham (No. 4), Tampa (No. 58), North Grand (No. 64), Denver (No. 29), Elwood (No. 50), Cincinnati (No. 15), Pulaski (No. 413), Los Angeles (No. 11), St. Louis (No. 73), Passaic (No. 30), Hurlock

(No. 24), Malden (No. 57), Mankato (No. 74). The Capping Program has been put into effect at other plants as well. For example, a TCG-I document dated 10/19/79, entitled "Plant Utilization Program Authorization," states:

> "This PUP covers the phase-down of #80 Pittsburg Press Department. This involves the transfer of beverage minsters to #442 Commerce beginning in 1978, the deletion of gang die activity as Kal Kan production declines at #11 Los Angeles and the transfer of O.T. press equipment and activity to the Northwest Division. *This PUP is being initiated to eliminate the long term unfunded people liability presently being generated at #80*. For this plant the 1988 unfunded liability is reduced .2MM and 1998 by 2.3MM, with the permanent layoff of 31 people." (Emphasis added.)

In addition, a memorandum dated September 18, 1980, prepared by a TCG-I executive, shows that pension considerations were a determinative factor in the closing of at least the #448 Worthington plant:

> "The alternative to shutdown is to re-tool the existing four (4) Conoweld I beverage lines or to install new can or end making equipment to manufacture some open top Food or General Packaging specifications. Any alternative, however, could not be supported by our current market base, would not be financially attractive, and would be inconsistent with our current strategic plan to shrink our facility base, [material deleted by defendants], and contain our unfunded liabilities.
>
> The Worthington plant is a Steelworker location and has a current unfunded liability of $1.3MM (121 hourly employees). Without any action our unfunded liability will increase to $2.0MM in 1985, $5.0MM in 1990 and $5.9MM in 1995."

(h) *Other Duplicitous Conduct*. Employees laid off under the Capping Program by TCG-I or, on information and belief, by any other defendant were never informed that pension eligibility was the cause of, or a factor in, their layoff. TCG-I and, on information and belief, other defendants often provided other, false and misleading explanations for the layoffs, as the following examples show. Some employees were told that their plants were "inefficient" and that other plants could make certain products at a lower cost. Employees at the Clearning, Illinois plant were told at a series of plant level and department level meetings in the 1970's that the widespread layoffs there were the result of the plant's inefficiency. Employees at various plants were also told that there was insufficient business at those plants. Employees at the Clearing plant were told that many jobs were lost because many containers were being made from plastic instead of metal and some companies were now manufacturing their own containers. Other employees were simply told that business was slow. Employees at the Passaic, New Jersey plant were told that jobs were being lost because some of the production formerly done at the Passaic plant was being transferred to another plant. If an employee was not explicitly provided a reason for being laid off, it was often implied that the reason was that there was simply not enough work to keep the employee employed. Other false and misleading explanations of the reasons for layoffs resulting in whole or in part from the Capping Program were regularly given to employees by TCG-I and, on information and belief, by other defendants. All of the foregoing representations and conduct were knowingly false and misleading in whole or in part because TCG-I failed to disclose that pension eligibility was the reason or one of the reasons for the layoffs.

Moreover, TCG-I and, on information and belief, other defendants regularly and intentionally led employees laid off under the Capping Program to believe that their layoff was temporary. For example, after his layoff in December of 1978, plaintiff Trojniar was told by supervisors at the Clearing plant that he would eventually return to work. Plaintiff Cartharn was told several times by a plant manager of Clearing plant, after his layoff, that he would soon return to work. Laid-off employees rightfully assumed the layoffs were temporary because of the defendants' conduct, including the fact that a layoff, as distinguished from a discharge, is generally not intended to be permanent. TCG-I had for many years laid employees off when work was slow, but had recalled those employees when the workload increased. All of the above representations were knowingly false and misleading, because defendants knew the layoffs were permanent. Many employees relied on this misleading conduct and thereby lost other employment opportunities.

24. On information and belief, the foregoing unlawful scheme and course of conduct initiated by TCG-I, involving the Capping Program, have been aided and abetted, perpetuated and continued by the other defendants to the present date.

25. (a) In the furtherance of the aforesaid unlawful scheme and course of conduct, defendants used, and caused to be used, mail delivered by the United States Postal Service on numerous occasions, right up the present date, in violation of 18 U.S.C. §1341.

(b) In furtherance of the said scheme and course of conduct, defendants on numerous occasions, right up to the present date, communicated and caused to be communicated, by wire in interstate commerce, in violation of 18 U.S.C. §1343.

26. By reason of the foregoing, defendants have engaged and are presently engaged in "a pattern of racketeering activity" as defined in 18 U.S.C. §1961(5) and violated Sections 1962 (*a*) and (*c*) of said statute.

27. There are eight "enterprises" herein, within the meaning of 18 U.S.C. §1961(4). They are as follows:

(a) Insofar as defendants' violations of 18 U.S.C. §1962(a) are concerned, the enterprises are as follows: (1) Until the July 1982 merger referred to in paragraph 3(b) above, the enterprise is TCG-I. (2) From the time of said merger until the present time, the enterprise is Continental Can Company, Inc. Violations of 18 U.S.C. §1962(a) occurred because: (1) From a date prior to 1975 until the July 1982 merger, TCG-I received income derived, directly or indirectly, from the pattern of racketeering alleged in this complaint which it used or invested in the enterprise TCG-I. (2) From the time of said merger until the November 1984 merger referred to in paragraph 3(b) defendants TCG-II, Continental Can Company, Inc. and Continental Packaging Company, Inc. received income derived, directly or indirectly, from the pattern of racketeering activity alleged in this complaint which they used or invested in the enterprise Continental Can Company, Inc. (3) From the time of the November 1984 merger until the present date defendants KMI Continental Inc., Continental Can Company, Inc. and Continental Packaging Company, Inc. received income derived, directly and indirectly, from the pattern of racketeering activity alleged in this complaint which they used or invested in the enterprise Continental Can Company, Inc.

(b) Insofar as defendants' violations, of 18 U.S.C. §1962(c) are concerned, the enterprises are: (1) an association-in-fact of the individuals comprising the bargaining unit defined in the collective bargaining agreements with United Steelworkers of America, AFL-CIO, which are referred to in paragraph 4 above; (2) a group of individuals consisting of officials and employees of TCG-I associated in fact for the purpose of devising and implementing plans and programs for limiting TCG-I's financial exposure or liability for employee welfare benefits; (c) Continental Can Company — USA, a member of TCG-I; (d) Continental Can Company, Inc.; (e) the Continental Pension Plan referred to in paragraph 4 above; and (f) each of the defendants. Throughout the period covered by this complaint, each defendant, during the time of its existence, was associated with each enterprise in existence at that time. Defendants' conduct alleged in this complaint constitutes the conduct or participation, directly or indirectly, in the conduct of the applicable enterprise's affairs through a pattern of racketeering activity, in violation of 18 U.S.C. §1962(c).

Each of the enterprises specified in this paragraph 27 engages in or has engaged in, or its activities affect or have affected, interstate commerce.

WHEREFORE, plaintiffs request the following relief under this Count I:

A. That the Court certify this action as a class action.

B. That the Court render a declaratory judgment finding and declaring that defendants' conduct alleged herein was and is in violation of Sections 1962(a) and (c) of RICO.

C. That the Court issue injunctions, preliminary and then permanent: (1) enjoining defendants from continuing to engage in such conduct and from committing any other acts for the purpose, in whole or in part, of interfering with the attainment of any right to which participants in its Pension Plan may become entitled; and (2) requiring defendants to reinstate each laid-off plaintiff and class member to the job to which he is entitled, with full seniority and all other rights and benefits.

D. That the Court award plaintiffs their costs and expenses, as well as reasonable attorneys' fees, relating to this action.

E. That the Court grant plaintiffs and the class herein such additional relief as may be appropriate.

COUNT II

[For Damages Caused By Defendants' Violations of Sections 1962(a) And (c) Of RICO]

28. Plaintiffs repeat and reallege paragraphs 1-27.

WHEREFORE, plaintiffs request the following relief under this Count II:

A. That the Court certify this action as a class action.

B. That each plaintiff and member of the class who has sustained damages as a result of defendants' unlawful conduct complained of herein receive judgment in the amount of threefold such damages.

C. That the Court award plaintiffs their costs and expenses, as well as reasonable attorneys' fees, relating to this action.

D. That the Court grant plaintiffs and the class herein such additional relief as may be appropriate.

COUNT III

[For Declaratory And Injunctive Relief Relating To Defendants' Violations Of Section 510 Of ERISA]

29. Plaintiffs repeat and reallege paragraphs 1-22.

30. Defendants' conduct alleged above was and is in violation of Section 510 of ERISA, 29 U.S.C. §1140, which provides:

> "It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary . . . for the purpose of interfering with the attainment of any right to which such participant may become entitled under [an employee benefit] plan. . . ."

WHEREFORE, plaintiffs request the following relief under this Count III:

A. That the Court certify this action as a class action.

B. That the Court render a declaratory judgment finding and declaring that defendants' adoption and implementation of the scheme alleged above violates Section 510 of ERISA.

C. That the Court issue injunctions, preliminary and then permanent: (1) enjoining defendants from the further implementation of the said scheme and from committing any other acts for the purpose, in whole or in part, of interfering with the attainment of any right to which participants in its Pension Plan may become entitled; and (2) requiring defendants to reinstate each laid-off plaintiff and class member to the job to which he is entitled, with full seniority and all other rights and benefits.

D. That the Court award plaintiffs their costs and expenses, as well as reasonable attorneys' fees, relating to this action.

E. That the Court grant plaintiffs and the class herein such additional relief as may be appropriate.

COUNT IV

[For Damages Caused by Defendants' Violations Of Section 510 Of ERISA]

31. Plaintiffs repeat and reallege paragraphs 1-22 and 30.

WHEREFORE, plaintiffs request the following relief under this Count IV:

A. That the Court certify this action as a class action.

B. That each plaintiff and member of the class who has suffered financial damage in whole or in part as a result of defendants' unlawful conduct alleged above receive judgment in the amount of such damage, including but not limited to backpay for all wages lost, for all pension benefits lost, and for all other employment benefits lost.

C. That the Court award plaintiffs their costs and expenses, as well as reasonable attorneys' fees, relating to this action.

D. That the Court grant plaintiffs and the class herein such additional relief as may be appropriate.

Respectfully submitted,

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JURY DEMAND

Plaintiffs demand trial by jury of all issues in all counts of the foregoing complaint.

One of the Attorneys
for Plaintiffs

Section E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

CECIL McLENDON, DON VANDERTULIP, JIMMIE CARTHARN, JR., and KONRAD TROJNIAR, on their own behalf and on behalf of all others similarly situated,
Plaintiffs,

v.

THE CONTINENTAL GROUP, INC., a New York corporation incorporated in 1913; CONTINENTAL CAN COMPANY, INC., a Delaware corporation; CONTINENTAL PACKAGING COMPANY, INC., a Delaware corporation; THE CONTINENTAL GROUP, INC., a New York corporation incorporated in 1982; and KMI CONTINENTAL INC., a New York corporation,
Defendants.

Civil Action
No. 83-1340 (SA)

Hon. H. Lee Sarokin,
Judge Presiding

Hon. Ronald J. Hedges,
Magistrate

DEFENDANTS' NOTICE OF MOTION FOR RECONSIDERATION, MODIFICATION, CLARIFICATION AND STAY OF THIS COURT'S ORDER OF SEPTEMBER 14, 1987 REGARDING REMEDIAL PHASE PROCEDURES

Return Date:
October 2, 1987

PLEASE TAKE NOTICE that on Friday, October 2, 1987, at 2:00 p.m. or as soon thereafter as counsel may be heard, the undersigned counsel for defendants Continental Group, Inc., *et al.*, (collectively "Continental") shall appear before the Court at the United States Post Office and Courthouse Building, Newark, New Jersey and move for an Order reconsidering, modifying, clarifying and staying this Court's order dated September 14, 1987 regarding procedures for the continued litigation of plaintiffs' ERISA and RICO claims. In support of its Motion, Continental states:

1. During the course of a joint telephone conference between the Court and counsel for all parties on September 3, 1987, the Court advised counsel that it was preparing a draft of Order regarding procedures for continued litigation of plaintiffs' ERISA and RICO claims (hereinafter "procedures Order") and that before any such Order would be entered, a draft of same would be circulated to all counsel for comment. (Tr. PP. 14, 21)

2. The procedures Order was entered on September 15, 1987. Counsel for Continental did not receive a draft of said Order before it was entered and for that reason had no opportunity to offer any comments or suggestions regarding the contents of same. Continental believes that the procedures Order as entered rests upon and includes substantial errors of law, violates Continental's right to due process, is fundamentally unfair to the defendant and is unclear in certain material respects.

3. The procedures Order clearly requires a non-jury trial of the ERISA claim before the RICO claim is to be adjudicated thus depriving Continental of its constitutional right to a jury trial. Continental has demanded a jury trial as to all issues with respect to which a jury trial is a matter of right, which includes all elements of the RICO claim. The facts allegedly supporting the RICO claim are entwined with the facts allegedly supporting the ERISA claim to such an extent that a bench trial of the ERISA claim will necessarily result in prior adjudication of facts essential to the RICO claim. A central issue of fact to be adjudicated in this litigation — the fact of injury — is common to both the ERISA and the RICO claims. Under these circumstances, Continental is entitled to a jury trial first on all issues common to both claims which determination is binding on the trier of the nonjury ERISA claims. *Beacon Theatres* v. *Westover*, 359 U.S. 500 (1959); *Dairy Queen* v. *Wood*, 369 U.S. 469 (1962); *GTE Sylvania, Inc.* v. *Continental TV Corp.*, 537 F.2d 980, 987 (9th Cir. 1976); *Amoco Oil Co.* v. *Torcomian*, 722 F.2d 1099, 1102 (3rd Cir. 1983); *E.E.O.C.* v. *Corey Jamestown Corp.*, 719 F.2d 1219, 1224 (3rd Cir. 1983). Plaintiffs' alleged

agreement "on the record" that the findings in the ERISA bench trial would not carry over to the RICO claim does not cure the constitutional defect in the procedures Order. *Beacon Theatres* and its progeny require the opposite: That the jury determination of common elements carry over to and bind the trier of the ERISA claim.

4. The procedures Order is further grounded on a misinterpretation of *Gavalik* which unequivocally requires the individual class members to establish by a preponderance of the evidence the requisite four elements *before* they become entitled to a presumption of liability. *Gavalik*, 812 F.2d at 866. There is nothing in *Gavalik* or any other reported decision which provides that a mere belief on the part of counsel that individual class members will be able to establish the four elements creates a presumption that they will in fact be able to do so thus shifting the burden to defendant to simultaneously disprove their belief and rebut the presumption of liability that would follow had the four requisite elements been properly established as *Gavalik* requires. There is nothing in *Gavalik* or any other reported decision which provides that plaintiffs' counsel can shift to the defendant the burden to rebut the presumption of liability that would flow from the establishment of the *Gavalik* elements merely by creating a list of persons who admittedly can not satisfy the elements, but who counsel believe should benefit from the presumption in any event.

5. The procedures Order is grounded on a further misinterpretation of *Gavalik* in that plaintiffs are not required by the Order to support the beliefs of their counsel as to satisfaction of the requisite elements or entitlement otherwise with evidence that Continental's actions relating to the individual claimants listed by counsel fall within the ambit of the liability avoidance plan (or program).

6. Due process of law requires the Court to give the parties, including Continental, a full and fair opportunity to be heard on the claims properly before it. *Thompson* v. *Madison County Board of Education*, 476 F.2d 676, 678 (5th Cir. 1973). The procedures Order constitutes a massive violation of Continental's right to due process of law in that it improperly requires

Continental to simultaneously disprove plaintiffs' case before it has been established and to prove its own defenses with respect to everyone listed by plaintiffs' counsel in an impossibly short time without benefit of full discovery as provided by discovery orders presently of record. Further, the extraordinary burden imposed on Continental by the Order, enforced as it is by preclusion orders directed only at Continental, serves no apparent purpose in terms of trial preparation[1] other than to relieve plaintiffs of any evidentiary burden whatsoever while denying to Continental any reasonable opportunity to develop and present the legitimate and forceful defenses it has to the claims brought against it. The Order, incorporating as it does the suggestions offered by plaintiffs' counsel, is apparently designed to and will certainly have the effect of depriving Continental of a fair trial.

7. The procedures Order is patently unreasonable in that it allows plaintiffs forty-five days to develop a simple list containing the names of several thousand claimants while at the same time permitting Continental no more than thirty days to develop, assemble and provide in form satisfactory to its adversaries all of the evidence it will be allowed to introduce to disprove plaintiffs' entitlement and establish its own defenses to the claims. The Court is aware that this nationwide class action was certified in January of this year and that the class as defined in the Certification Order is without value in terms of identifying either individual claimants or specific plants said to be within the "ambit" of the avoidance plan. The procedures Order itself recognizes the obvious defects in the class definition by requiring plaintiffs to finally produce an actual list of claimants the parties can address in terms of trial preparation. The Court is also aware that the list when produced will include at least several thousand claimants employed over a ten-year period at between 31 and 53 different Continental facilities around the nation, that Magistrate Hedges currently has in place discovery Orders that are inconsistent with the thirty-day deadline imposed on Continental by the procedures Order, that Continental

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[1] The *Manual for Complex Litigation* (2nd) (1985) contemplates nothing like the procedures Order as entered.

will require extensive depositions of former employees, competitors and customers from outside the District of New Jersey to establish its defenses, that Magistrate Hedges continued all depositions at the request of plaintiffs for a three-month period from June until September, 1987, and that nearly one million documents were produced by Continental in this litigation with the last three hundred thousand or more being delivered at the end of August, 1987. Against this background the procedures Order clearly provides insufficient time for Continental to begin to collect, analyze, assemble and present information essential to its defense.

8. The procedures Order lacks clarity with respect to the following important questions:

> a) Will the plaintiffs be required to support the list of named claimants with any facts concerning proximity of said claimants at layoff to qualifying for the Magic Number pensions? If not, why not?
>
> b) Will plaintiffs be permitted to supplement the lists of claimants after the seventy-five day period provided in the order? If so, will defendants be permitted to respond to the supplementary lists with evidence?
>
> c) If Continental answers that it cannot respond due to lack of information and an affidavit is provided by plaintiffs, will Continental have any right to cross examine the affiants?
>
> d) Will plaintiffs be permitted to take discovery after the seventy-five day period with respect to the information provided by Continental in accordance with deadlines established by the Order? If so, what is the scope and duration of the discovery plaintiffs will be allowed to take?
>
> e) Will plaintiffs be required at any time to provide to Continental in the manner set forth in the Order their evidence concerning establishment of the *Gavalik* elements, as well as the same loss of work issue? If so, when?

f) How and when will the "make whole" damages, if any, be calculated and when will Continental be permitted to take discovery of individual claimants in this regard?

g) Is Continental required to provide testimony by experts it intends to call at trial within the thirty-day period allowed by the Order?

h) Why does the Order state that it shall not be construed to curtail or limit discovery in any way when defendant is barred from introducing new evidence after seventy-five days?

WHEREFORE, for each of the foregoing reasons, Continental respectfully requests that the Court:

1. Reconsider and strike in its entirety the procedures Order dated September 14, 1987, and entered on September 15, 1987; and

2. Order counsel for the parties to submit proposed orders for the continued litigation of plaintiffs' ERISA and RICO claims in accordance with principles set forth in *Gavalik* and *Beacon Theatres*, and the *Manual for Complex Litigation* (2nd); or

3. Modify the procedures Order so as to extend the 75-day deadline set forth in Paragraph 4 thereof to 120 days, eliminate the language set forth in Paragraph 4(1) beginning with "Shall" and ending with "person", amend Paragraph 4(1)(a) to provide Continental with the right to reasonable discovery upon receipt of affidavits as provided therein, eliminate entirely Paragraph 4(2) as well as all of Page 3 of the Order and the first eight lines of Page 4 down to the second full paragraph thereon; and

4. Clarify the Order in the particulars set forth in Paragraph 8 of this Motion.

5. Stay the procedures Order until under further notice by the Court.

Dated this 24th day of September, 1987.

Respectfully submitted,

THE CONTINENTAL GROUP, INC.,
CONTINENTAL CAN COMPANY, USA, INC.,
CONTINENTAL PACKAGING COMPANY, INC.,
THE CONTINENTAL GROUP, INC., and KMI CONTINENTAL INC.

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Section F

IN THE UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 87-

CECIL MCLENDON, DON VANDERTULIP, JIMMIE CARTHARN, JR. and KONRAD TROJNIAR, on their own behalf and on behalf of all others similarly situated,
Plaintiffs-Respondents,

v.

THE CONTINENTAL GROUP, INC., a New York corporation incorporated in 1913; CONTINENTAL CAN COMPANY, INC., a Delaware corporation; CONTINENTAL PACKAGING COMPANY, INC., a Delaware corporation; THE CONTINENTAL GROUP, INC., a New York corporation incorporated in 1982; and KMI CONTINENTAL INC., a New York corporation,
Defendants-Petitioners.

THE CONTINENTAL GROUP, INC., a New York corporation incorporated in 1913; CONTINENTAL CAN COMPANY, INC., a Delaware corporation; CONTINENTAL PACKAGING COMPANY, INC., a Delaware corporation; THE CONTINENTAL GROUP, INC., a New York corporation incorporated in 1982; and KMI CONTINENTAL INC., a New York corporation,
Petitioners,

v.

HONORABLE H. LEE SAROKIN, United States District Judge for the District of New Jersey,
Nominal Respondent.

Date: November 12, 1987

Sat Below: Honorable
H. Lee Sarokin, U.S.D.J.

Hon. Ronald J. Hedges,
Magistrate

PETITION FOR A WRIT OF MANDAMUS, PROHIBITION OR OTHER APPROPRIATE RELIEF

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I. *INTRODUCTION*

Pursuant to 28 U.S.C. § 1651 and Rule 21 of the Federal Rules of Appellate Procedure, petitioners Continental Group, *et al*. respectfully request that this Honorable Court Issue a Writ of Mandamus or other appropriate writ directing the Honorable H. Lee Sarokin, Judge of the United States District Court for the District of New Jersey to vacate the opinions and orders entered by the district court on September 14 and October 15, 1987 (attached as Collective Exhibit 1), in *McLendon v. Continental Group, Inc., et al.*, Civ. No. 83-1340, that have the effect of depriving petitioners of their constitutional rights to due process and to a jury trial. A detailed description of the relief requested is contained on pages 4-5.

Petitioners (Continental) submit that the challenged orders are not reviewable on appeal as final collateral orders under the doctrine of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). Continental submits the petition in accordance with this view. Continental is nonetheless filing a notice of appeal with the district court simultaneous with the filing of this petition to ensure review by this Court of the actions complained of, should the court determine that appeal under the collateral order doctrine is appropriate.

Continental is also filing with the district court simultaneous with this petition a motion for a stay of the orders complained of pending the Third Circuit's consideration of the petition. As discussed in the motion and in this petition, the effects of the orders are irreparable and must be corrected as quickly as possible.

A. *Grounds for the Petition.*

The grounds for this petition are:

The September 14, 1987, order of the court below effectively denies the petitioners, defendants in a class action, two of their constitutionally guaranteed rights, the right to due process of law under the fifth amendment and the right to a jury trial under the seventh amendment.

1. *Denial of Due Process.*

Specifically, the trial court has denied petitioners due process in two ways:

a. the order arbitrarily and unreasonably sets a time limit (75 days, which expires November 30, 1987) on the presentation of a detailed identification and statement of petitioners' complete defenses (including the identification of (1) all objections to the claims of alleged class members, (2) all documentary and testamentary evidence (including expert testimony) that will be used by defendants to support their defenses), even though

> (a) previous discovery orders of the magistrate had allowed until at least February 29, 1988, to complete discovery by the parties — that is, at the time of the court's order, discovery was not scheduled to be completed until nearly 90 days *after* the date Continental now must submit complete statement of their defenses;
>
> (b) the class was not certified until January 1987 and the members have not been in fact finally identified as of the date of this submission (1,746 alleged members were identified on October 8, 1987; a revised list of 2,284 members was provided on October 29 — *only 30 days prior to when petitioners' response is due to the trial court*) and the court has recognized that this case is "complex;"
>
> (c) the trial court has only recently (May 28, 1987, as clarified on September 14, 1987) ruled that it views petitioners as being collaterally estopped from contesting liability at plants that have *never* been the subject of prior litigation about alleged violations of pension rights, thus causing petitioners' counsel to refocus their defense strategy to development of "damage" defense issues; indeed, petitioners had submitted massive affidavit evidence attesting to the fact that no discriminatory "plan" was ever implemented at the various potential plant locations, which evidence was ignored by the court on its theory of collateral estoppel; and

(d) the trial court's own schedule (which includes a trial commencing in January 1988) makes early trial of this class action an impossibility, reinforcing the arbitrariness of the presentation date of petitioners' defenses.

b. The trial court has presumed entitlement to relief for any plaintiff who can demonstrate that he/she was at work and allegedly "permanently" laid off and has denied petitioners the right to demonstrate that there were no implementing acts of the "plan" at particular plants affecting any such plaintiff. Such a presumption of liability and the refusal to consider the existence of whether any "plan" was ever implemented at individual plants both deny petitioners due process and misinterpret this Court's recent decision in *Gavalik v. Continental Can Co.*, 812 F.2d 834 (3d Cir. 1987).

2. *Denial of Jury Trial*

With regard to denial of the constitutional right to a jury trial, the September 14, 1987, order states that the court will first try the plaintiffs' equitable, ERISA-based claims before allowing a jury trial of their legal RICO claims, alleging the case's complexity gives the trial court the discretion not to have a jury trial first. The court's order has denied Continental its right to a jury trial of the facts common to both RICO and ERISA claims in direct conflict with the teaching of *Beacon Theatres v. Westover*, 359 U.S. 500 (1959) and its progeny, which require, in the instance of a single trial with equitable and legal claims, legal claims to be tried first to a jury before a bench trial. Additionally, district court decisions in this Circuit and decisions of the 9th circuit have found findings of a jury in a *Beacon Theatres* setting to be binding on the trial court. Moreover, the trial court does not have the discretion to deny a jury trial on the basis of "complexity" absent specific findings "on the dimensions of the complexity." *In re Japanese Electronic Products Antitrust Litigation*, 631 F.2d 1069, 1089 (3d Cir. 1980). The trial court here has not made such findings.

B. *Relief Sought by Continental.*

Continental requests that this Court issue a Writ of Mandamus or other appropriate writ directing the Honorable H. Lee Sarokin, Judge of the United States District Court for the District of New Jersey:

1. to vacate the opinions and orders entered by the district court on (a) September 14, 1987, in *McLendon v. Continental Group, Inc., et al.*, Civ. No. 83-1340 (as confirmed by the district court's order of October 15, 1987, denying the petitioners' motion for reconsideration of that order) and (b) October 15, 1987 (denying in part motion for partial summary judgment);

2. to permit Continental until June 30, 1988, to submit a detailed listing of all defenses to the claims of all plaintiffs identified by plaintiffs as of October 29, 1987, including all defenses that no liability avoidance plan was ever implemented with regard to certain groups of employees or at certain plants;

3. to limit the identification of plaintiffs to those identified on, or before December 31, 1987;

4. to require the plaintiffs to submit by March 31, 1988, a detailed statement of all documentary and testamentary evidence intended to (a) support an allegation of implementation of the allegedly discriminatory "plan" at each plant where implementation is alleged to have occurred, (b) support entitlement to damages, assuming *arguendo* there has been implementation of the "plan" at a particular plant, including the four (4) *Gavalik* elements;

5. to hold a jury trial of all factual issues raised in *McLendon* prior to any ruling by the trial court on the ERISA claims, with the findings of fact by the jury to be controlling on the trial court; and

6. to provide such other direction to the trial court as appears appropriate.

II. *STATEMENT OF THE CASE*

A. *Statement of the Facts and Procedural History.*

1. *Class definition.*

Continental experienced significant reductions in workforce in the 1970's and early 80's as changing technology and increasing levels of self-manufacture by customers reduced the demand for cans produced at many Continental plants. The result was very large reductions in workforce at many plants and the closure of a number of plants.

The original complaint in the action for which the defendants seek a writ of mandamus from this court was filed on April 15, 1983. The second amended complaint, filed on February 20, 1985 (copy is attached as Exhibit 2) contains allegations that during this time period Continental discriminated against certain of its employees, laying them off in order to prevent them from obtaining certain special additional pension rights known as Rule of 65 and 70/75 pension rights. Such "magic number" pension benefits are in addition to normal retirement benefits. Counts I (declaratory and injunctive relief) and II (damages) of the complaint assent that the alleged actions constituted a "pattern of racketeering activity," in violation of 18 U.S.C. § 1962(a) and (c) of the Racketeer Influenced and Corrupt Organizations Act (RICO). Counts III and IV allege that they constituted a violation of section 510 of ERISA, 29 U.S.C. § 1140.

Both parties, plaintiffs in their complaints, and Continental in its answer (Exhibit 3), requested a jury trial of all claims. The class was not certified until January 8, 1987. The class was defined as consisting of:

> all past or present members of the Continental Pension Plan who suffered a break in pension service subsequent to December 1, 1977, or who shall hereafter suffer a break in pension service, as a result, in whole or in part, of Continental's alleged Capping Program . . . .

McLendon v. Continental Group, Inc., et al., 660 F. Supp.

1553, 1556 (D.N.J. 1987). Approximately 9,000 potential claimants received notice.

Continental has sought for some time to have the plaintiffs or the court focus on the overbreadth and lack of clarity of the initial class description. For example, in a letter of August 26, 1987 (Exhibit 4), Continental wrote the court that the class as certified by Judge Sarokin in January was undefined. Continental pointed out (as it had in prior correspondence) that persons laid off at a time they were already qualified for magic-number pensions or persons that at the time of their layoff were many years away from so qualifying could not possibly be among the class of people allegedly affected by the "plan." Continental then argued that the parties should produce a list of USW members who were designated "permanently laid off" by Continental "within two years of attaining eligibility for 70/75 or Rule of 65." Continental stated that these individuals appeared to be the only putative claimants for relief. The trial court, to date, has not so limited the class (or even the individuals who will be presumed to satisfy the liability criteria).

During the month of October 1987, plaintiffs identified first 1,746 (October 8) and then 2,284 individuals (October 29) who allegedly are members of the class. The list of plaintiffs who are identified members of the class remains incomplete as of the signing of these papers.

2. *Discovery process*.

There has been massive document discovery by plaintiffs' counsel, with Continental having produced more than one million pages of documents thus far. Discovery has been supervised by Magistrate Hedges who has issued a series of orders controlling the timing and extent of discovery permitted. The initial cut-off dates for discovery were included in the magistrate's April 1, 1987, order: "all fact deposition discovery contemplated by either party be completed by November 15, 1987; all expert discovery, including depositions is to be completed by February 29, 1988." April 1, 1987, Order of Magistrate Hedges at 3, ¶ 8-9 (Exhibit 5). Based upon plaintiffs' request, Magistrate Hedges adjourned all depositions until

September 1, 1987, in order to give plaintiffs an opportunity to process documents furnished by the defendants. Magistrate Hedges' July 15, 1987, Order at 4, ¶ 10 (Exhibit 6). The question of *extending* the discovery cut-off dates is presently pending before the Magistrate. *See, e.g.*, September 28, 1987, Order of Magistrate Hedges at 4, ¶ 14 (Exhibit 7) (Note that the status conference scheduled for October 26, 1987, has been postponed).

3. *Liability — Motions for partial summary judgment*.

In late 1986, plaintiffs filed a motion for partial summary judgment with regard to the liability phase of the case. Continental filed a massive opposition to the motion for partial summary judgment, including, *inter alia*, affidavits from more than 80 existing and former Continental employees which attested to their knowledge and belief that any "plan" that may have existed at the Corporation was not, in fact, implemented at a large number of named plants. Defendants' Memorandum in Opposition to Plaintiffs' Motion for Partial Summary Judgment (Exhibit 8). In May of 1987 the district court granted partial summary judgment for the plaintiffs on the ERISA counts. *McLendon*. Based on the Third Circuit's holding in *Gavalik v. Continental Can Co.*, 812 F.2d 834 (3d Cir. 1987), a case which concerned a single Continental plant and one specifically excluded from *McLendon*, the court held that defendants were collaterally estopped from rearguing:

> 1) that Continetal developed and adopted a nationwide liability avoidance program as corporate policy; 2) that a determinative factor in that action was Contintenal's intent to deprive plaintiffs of Magic Number pensions.

McLendon, 660 F. Supp. at 1560.

The meaning of this language was articulated by the trial court in an order denying a second motion for partial summary judgment with regard to selected employees at one plant (Passaic):

> Continental argues that plaintiffs, prior to moving to the remedial proceedings contemplated by *Gavalik*, must

> establish that Continental's specific layoff decisions were motivated in part by a discriminatory purpose. However, plaintiffs have met their burden of causation as to liability by establishing that Continental's discriminatory intent was a determinative factor in the conduct constituting the classwide violation — development and adoption of the liability avoidance program. *See McLendon v. Continental Group*, 660 F. Supp. 1553 (D.N.J. 1987). Continental's argument is relevant to whether class members would have suffered the same loss of work in the absence of the program.

Order of October 15, 1987, at 2 n.1 (Exhibit 9).

4. *Procedures for trial.*

Following the May summary judgment decision, plaintiff submitted on June 18, 1987, proposed procedures for the continued litigation of both the ERISA and the RICO claims (Exhibit 10 hereto). The proposed procedure would have prevented the case from being heard in the first instance by a jury, would have imposed an obviously arbitrary timetable on Continental that did not even reflect the existing orders on discovery and required Continental to present all its evidence within a very short period of time, while imposing no such burden on the plaintiff. See Continental's July 6 Memorandum at 16, 20 (Exhibit 11). Continental raised its objections to a denial of a jury trial in its July 6, 1987, response, at a conference held on July 28, 1987, and in a postconference letter to the court on August 14, 1987. Exhibit 12.

During a telephone conference on September 3, 1987, the court informed counsel that it was preparing a draft of an order establishing procedures for the remainder of the trial, and that a draft of this order would be circulated among all counsel for comment. Tr. at 21 (Exhibit 13).

Less than two weeks later, however, on September 14, 1987, without consulting defense counsel or providing an opportunity for comment, Judge Sarokin entered an order very similar to that proposed by plaintiffs' counsel. The order denied Continental's request that the facts pertinent to both ERISA and

RICO claims be tried before a jury in conformance with the parties' request for a jury trial.[1] Collective Exhibit 1.

In that same order, Judge Sarokin determined that to obtain relief, individual class members had to establish that they were:

(a) non-vested employees eligible for 70/75 and/or Rule of 65 pension benefits,

(b) available for work,

(c) labeled (or designated) as permanently laid off by Continental, and

(d) laid off or continued on layoff status prior to attaining eligibility for those benefits.

September 14, 1987, Order at 2. The order stated that each person as to whom these four elements were established would be entitled to recovery unless Continental established "that, even in the absence of Continental's illegal liability avoidance plan (or program), that person would have been without work at the same time in any event." *Id*.

Judge Sarokin then ordered plaintiffs to produce within 45 days of the entry of the order "a list of persons plaintiffs presently claim satisfy the four elements set forth above," *id*. at 2, and another list "of persons plaintiffs do not claim satisfy the four elements set forth above and the basis for their entitlement nevertheless." *Id*. at 3. The order explicitly allows plaintiffs to supplement both lists from time to time. Plaintiffs were not ordered to offer any supporting evidence.

Continental, on the other hand was ordered to produce, within 75 days of the order, (1) a list of people whom Continental contended did not satisfy the four elements of the order, and (2) a list of people whom Continental contended would have been without work at the same time even absent the "liability avoidance plan." *Id.* at 3. For each of its contentions Continental was ordered to "specify any documentary and tesitmonial evidence upon which defendants may rely." In specifying such testimonial evidence Continental was ordered to:

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[1] The pertinent portion of the court's order reads "ORDERED that the determination of the procedures to adjudicate plaintiffs' RICO claim shall be deferred until after the initial trial of the ERISA claim." *Id*. at 5. At a subsequent hearing on October 2, 1987, the court clarified that the trial of the ERISA claim was to be a bench trial.

> state the name, address and position of the witnesses upon whom they may rely, the basis of each witness's knowledge and a summary of the testimony the witness is expected to give. The summary shall be sufficient to clearly and fully inform the plaintiffs of the substance of defendants' factual contentions. Save for good cause shown and with leave of the court, defendants shall not be permitted to present evidence not disclosed to plaintiffs as required by this paragraph.

September 14, 1987, Order at 4.

5. *Motion for Reconsideration.*

On September 24, 1987, counsel for Continental filed a "Motion to Reconsider, Modify, Clarify and Stay" Judge Sarokin's order of September 14, 1987. Exhibit 14. The motion argued that the order unfairly deprived Continental of a jury trial on all issues common to both the ERISA and the RICO claims. Motion at 2-3. The motion also argued that the order constitued "a massive violation of Continental's right to due process of law" because Continental was permitted no more than 30 days to "develop, assemble and provide in form satisfactory to its adversaries all of the evidence it will be allowed to introduce to disprove plaintiffs' entitlement and establish its own defenses to the claims." *Id.* at 5.

Continental's motion noted that the class certification order as entered on January 8 was "without value in terms of identifying either individual claimants or specific plants said to be within the 'ambit' of the avoidance plan" and that plaintiffs' claims would likely encompass several thousands of claimants employed over a ten-year period at between 31 and 53 Continental facilities, and Continental would likely require "extensive depositions of former employees, competitiors and customers from outside the District of New Jersey to establish its defenses." *Id*. at 6. Moreover, Magistrate Hedges, at the request of the plaintiffs, had continued all depositions for a two-and-a-quarter month period from June 22 until September 1987, and Continental had produced nearly one million documents, with the last three hundred thousand or more being delivered at the end of August 1987. Continental's motion also pointed out that Magistrate Hedges currently has discovery orders in place that are inconsistent with the 30-day deadline. *Id*.

Plaintiffs filed their opposition on October 1, 1987. Exhibit 15. Continental presented its arguments again at an October 2, 1987, hearing before Judge Sarokin. Continental, among other things noted that the loss of labor in the can industry had not only affected hourly employees but that many salaried manageial employees also had left the company affecting Continental's ability to obtain evidence relevant to its defense. Tr. 34-43 (Exhibit 16). The trial court indicated that it would not stay its September 14, 1987, order during oral argument.

On October 8, 1987, while the motion for reconsideration was pending, plaintiffs submitted a partial list identifying individual claimants from 26 separate plants. Cover Letter attached as Exhibit 17. This first list contained 1,746 claimants. A supplement list that brought the total of claimants to 2,284 and increased the number of plants involved to 44 was filed on October 29, 1987, with an indication that the list "will be supplemented by plaintiffs from time to time."

Continental summarized its position in its letter to the Court of October 13, 1987. Exhibit 18. Continental noted, among other things, that it has pressed into service more than 17 lawyers and paralegals on a nearly round-the-clock basis; that much of the evidence had to be obtained from people that were never under Contintenal's control (customers, competitors) or people that were no longer under Continental's control at this time (manageial employees no longer employed by Continental). October 13, 1987, Letter at 5-7. Continental referred to the strong evidence it had already submitted concerning layoffs at one plant (in response to plaintiffs' summary judgment motion with respect to certain claimants), and added that it could not "completely and adequately perform the same task 30 times over within the timeframes set forth in the September 14 procedures Order." October 13, 1987, Letter at 1.

On October 15, 1987, Judge Sarokin denied Continental's motion for reconsideration. Collective Exhibit 1.

B. *Effects of Judge Sarokin's Order.*

1. *The Order Will Restrict Defendants to Presenting Only a Partial Defense.*

The September 14, 1987, order denies Continental its right to present its defenses in a number of different ways: 1) it precludes Continental from obtaining via discovery important information pertinent to its defenses 2) it requires the company to identify those defenses and the evidence that will support them in a period of time that is insufficient for the task, 3) it precludes the company from providing any evidence at all as to some defenses.

If the district court's September 14, 1987, order is not reserved by this Court, Continental will do its best to document as many of its defenses as possible within the arbirarily limted time allowed. The trial court's contested orders will preclude Continental from presenting any evidence as to other defenses at trial. Those defenses that the order precludes Continental from raising at all will not appear in the record. Any verdict by the court or jury will be inherently flawed because it will be based on an incomplete presentation of the petitioners' defenses. This Circuit will not be able to provide appropriate review because the record below will be incomplete. Thus, Continental will be deprived of its due process right to fully present its defenses.

2. *The Order Denies Defendants Their Right to a Jury Trial.*

The court's order of September 14, 1987, calls for a bench trial of ERISA claims before consideration of the RICO claims. A bench finding that a plaintiff has suffered recoverable damages under ERISA will necessarily address the same facts that may give rise to a right of recovery under RICO. Such a finding will irreparably preclude the defendants from having a jury make findings of common fact in the first instance as required in *Beacon Theatres v. Westover*, 359 U.S. 500 (1959), and from having those findings bind the trial court as found necessary under *Beacon Theatres* by other district courts in this circuit and the opinions of the 9th Circuit. Such actions by the trial court violates Continental's right to a jury trial.

C. *The Requirements for Mandamus Relief.*

Mandamus lies to preserve these constitutional rights of the petitioners. Under the All Writs Act, 28 U.S.C. §1651(a) (1982), the federal courts may issue writs "necessary or appropriate in aid of their respective jurisdictions." Mandamus is an appropriate remedy where the petitioner can demonstrate that he has "no other adequate means to attain the relief he desires." *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 35 (1980). For the writ to issue, the asserted error must be one which cannot be adequately corrected by the appeals process. *Kerr v. United States District Court*, 426 U.S. 394, 403 (1976). Moreover, the petitioner must establish that his right to issuance of the writ is "clear and indisputable." *Bankers Life and Casualty Co. v. Holland*, 346 U.S. 379, 384 (1953).

1. *Mandamus Lies To Preserve Petitioners' Due Process Rights.*

Appellate courts have exercised their mandamus powers in a variety of pretrial matters. *See Bogosian v. Gulf Oil Corp.*, 738 F.2d 587 (3d Cir. 1984) (although an actual writ was not issued, the appellate court remanded to the district court with directions to prevent the discovery of attorney work product.), *Cippolone v. Liggett Group, Inc.*, 785 F.2d 1108 (3d Cir. 1986) (writ issued to prevent the publication of documents received pursuant to discovery), and *International Business Machines Corp. v. Edelstein*, 526 F.2d 37 (2d Cir. 1975).

In *Edelstein*, the petitioner, IBM, sought relief from the acts of the trial judge in 1) precluding IBM from privately interviewing adverse witnesses; 2) refusing to file IBM's papers with the Clerk of Court as required by Fed.R.Civ.P.5(e); and 3) ordering IBM not to make oral motions in open court during the trial. The Second Circuit issued a writ of mandamus granting relief to IBM on all three elements of its claims. After noting that the alleged errors would not be subject to appellate review, the court stated:

> The asserted errors are wholly collateral to the resolution of the legal issues involved. They deal only with the manner of developing such issues. *Restrictions which may impede the development, presentation, and determination of facts should be avoided wherever possible — particularly at the comparative outset of such a trial as here*.

526 F.2d at 41 (emphasis added; footnote omitted). The court went on to discuss the effect the restrictions on interviewing had on counsels' ability to present their case. The court indicated that the methods chosen by the judge:

> have unduly infringed upon counsels' ability to prepare their case for trial, and have, in addition, lessened the effectiveness of that trial by placing before the Court, not the case as finally prepared and refined by counsel, but rather a hodgepodge of information accumulated in the early stages of counsel's preparation.

Id. at 42.

In *National Farmers' Organization, Inc. v. Oliver*, 530 F.2d 815 (8th Cir. 1976), the Eighth Circuit addressed a petition for writ of mandamus asking the Court to compel a district court judge who had been holding off-the-record discussions of pending motions and then ruling on them on the record to hold future proceedings competely on the record. The Court, referring to *Edelstein*, found that:

> Review by mandamus is appropriate *where a court's prospective appellate jurisdiction might otherwise be thwarted*. . . . Here, *were petitioner denied an opportunity to make a complete record on certain matters*, review of those matters on an ensuing appeal would be foreclosed since the court of appeals' inquiry is limited to matters in the record. Moreover, it is doubtful that any error in holding off-the-record proceedings could be effectively corrected on direct appeal following the termination of the district court litigation.

Id. at 816-817 (emphasis added; citations omitted).

These cases stand for the principle that a trial court's interference with the presentation of a party's defenses on the record in the manner in which the party wishes to present those defenses constitutes action that may be corrected by a writ of mandamus. A record that does not present the complete defense or presents it in a distorted manner precludes correction of the flawed proceedings on appeal.

The basic requirements for issuance of a writ are all present here. The court has exceeded its authority by issuing an order that denies the petitioner's due process rights. Unless the court determines that the order fits within the collateral order doctrine, it is an interlocutory order which may not be reviewed until entry of final judgment.[2] Thus, petitioners' have no other remedy. Finally, if the order stands, the petitioners' will not be able to present their defenses in full which will in turn preclude proper appellate review; thus the harm will be irreparable.

2. *Mandamus Also Lies to Preserve Petitioners' Right to a Jury Trial.*

Mandamus is the appropriate remedy to address the district court's denial of Continental's right to a jury trial. *Beacon*

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[2] Mandamus jurisdiction will not lie in some cases where there exists an alternative basis for appellate jurisdiction, such as certification for interlocutory appeal by the district court. *Rapp v. Van Dusen*, 350 F.2d 806, 813 (3d Cir. 1965); *Sporck v. Peil*, 759 F.2d 312, 315 n.4 (3d Cir. 1985), *cert. denied*, 474 U.S. 903 (1985). Certification of orders for interlocutory appeal is restricted to those orders 1) which involve a controlling question of law, 2) as to which there is substantial ground for difference of opinion, and 3) the immediate appeal of which would materially advance the ultimate termination of the litigation. 28 U.S.C. §1292(b).

The denial of due process caused by the district court's order is not properly subject to certification as an interlocutory order under 28 U.S.C. §1292(b). For example, the order cannot be said to involve a "controlling" question of law. The establishment of a timetable for the presentation of Continental's defense involves an act beyond the bounds of the district court's discretion, amounting to a denial of the right to present a complete defense. Where the district court rules on the basis of its discretion, the "controlling question of law criterion" is not satisfied. *See generally* 9 J. Moore, Moore's Federal Practice ¶110.22[5] (2d ed. 1987).

Theaters; Dairy Queen, Inc.; In re Union Nacional de Trabajadores, 502 F.2d 113, 115-116 (1st Cir. 1974) ("In a civil case, there is no doubt that mandamus is appropriate if a jury trial is being wrongfully denied, even, it would appear, when the decision whether such right exists is a close or complicated one.") (writ subsequently recalled for other reasons); *Eldredge v. Gourley*, 505 F.2d 769 (3d Cir. 1974) ("[A] writ of mandamus is an appropriate means of protecting the right to jury trial."); *Filmon Process Corp. v. Sirica*, 379 F.2d 449, 450-51 (D.C. Cir. 1967) ("[T]he Supreme Court expects the courts of appeals to make a determination whether or not there is a right of trial by jury, regardless of whether the question is a close or complicated one, and . . . the Court would not welcome a doctrine whereby a party's constitutional right to jury trial was trammeled in fact because a court of appeals determined that the issue was doubtful. . .")

A writ lies to correct that portion of the order at issue here. The court has exceeded its authority by issuing an order that denies the petitioners' right to a jury trial. Unless the court determines that the order fits within the collateral order doctrine, it is an interlocutory order which may not be reviewed until entry of final judgment.[3] Thus, petitioners' have no other remedy and mandamus is appropriate.

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[3] As is the case with the denial of Continental's right to due process, the denial effected by the district court's order is not subject to certification as an interlocutory order under 28 U.S.C. §1292(b). The district court denied Continental's request for an initial jury trial with regard to RICO issues on the basis of its asserted *discretion* to do so in complex cases. *See* October 15, 1987, Order at 3 ("Given the complexity of this matter, the court concludes that it possesses the discretion to proceed in this fashion, preserving Continental's right to a jury trial on the RICO claims.") where the district court rules on the basis of its discretion, the "controlling question of law criterion" is not satisfied. *See generally* Moore's Federal Practice, *supra*, ¶110.22[5] (2d ed. 1987).

III. *DISCUSSION*

A. *The Court's September 14 and October 15, 1987, Orders Violate Continental's Due Process Rights.*

The opportunity to present all defenses available is essential to the basic due process right to a fair hearing. *Lindsey v. Normet*, 405 U.S. 56, 66 (1972). This Circuit articulates the right: "[d]ue process mandates that a judicial proceeding give all parties an opportunity to be heard on the *critical and decisive allegations* which go to the *core* of the parties' claim or defense and to present evidence on the contested facts." *Complaint of Bankers Trust Co.*, 752 F.2d 874, 890 (3d Cir. 1985) (emphasis in original). The September 14 and October 15, 1987, orders violate Continental's due process right to present its defenses fully by precluding it from discovering pertinent evidence, by providing it insufficient time to identify evidence as to certain defenses, and by precluding it altogether from presenting evidence of other defenses.[4] The limitations imposed on Continental by the order have no plausible justification in the record of this large class action where specific plaintiffs have only recently been identified and where the court has required Continental to shift its focus of defense away from no liability to no damages in the last few months. Indeed, review of the trial calendar for Judge Sarokin indicates that he has trial of a complex case scheduled to commence in January of 1988. *Cippolone v. Liggett Group, Inc.*, Civil Action No. 83-2864(SA), Order of Magistrate Hedges at 2 (Exhibit 19). Because of this schedule, Judge Sarokin may be unable to try the present action until well into 1988 at the earliest. Thus the record does not even reveal court convenience as a plausible justification for the plainly inadequate time afforded Continental to prepare its defenses.

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[4] The September 14, 1987, order allows Continental to present evidence that is not identified in its response only "for good cause shown and with leave of the court." September 14 Order at 4 (Collective Exhibit 1). During oral argument on October 2, the court refused to stay the running of the 75-day time period for Continental despite Continental's protests that the time was plainly inadequate to marshall all its defenses. It is, thus, apparent that "good cause" may not be found where Continental indicates that the reason for late submission of supplemental information was lack of time in the 75-day period.

1. *Continental May Not Discover Important Information.*

Under the September 14, 1987, order, discovery in this action may proceed normally; but Continental may not use the product of its discovery unless it is included in its response due 75 days from the date of the order (November 30, 1987) or unless Continental can show good cause why it should be admitted. The names of all of the 2,284 individuals presently constituting the class of plaintiffs were made known to Continental on October 29, 1987 (1,746 names had been provided on October 8), 30 days before the company must respond to the court's order. As discussed below, Continental wants to engage in discovery so as to provide a broad range of evidence in its defense, information that clearly may not be collected in the time allotted since Continental's counsel are attempting to assemble the best response they can to the order and have little, if any, time to engage in discovery. Thus, Continental is prevented from presenting its full defenses because it is unable to discover evidence important to those defenses in sufficient time to include reference to it in its November 30, 1987, submission.

2. *Continental May Not Present Important Defenses Because of Insufficient Time.*

The district court's orders severely limit the defendants' ability to present a defense with respect to its liability to individual plaintiffs. First, the September 14 order restricts the time in which defendants may provide evidence that individual members of the plaintiff class are not entitled to recovery, permitting only *30 days* from the time that plaintiffs are required to submit their list of of claimants to prepare and submit a huge amount of detailed individual-specific evidence. Plaintiffs first submitted a list of 1,746 individual class members on October 8 (effectively allowing defendants approximately 50 days) and then submitted a supplemental list on October 29, raising the number of class members to 2,284. Plaintiffs may still submit additional lists in the future.

Second, the October 15, 1987, order denying, in part, plaintiffs' second motion for partial summary judgment (Exhibit 9) makes it clear 1) that Continental will not be able to defeat the claims of any plaintiffs by presenting evidence that there were no implementing acts at particular plants and 2) that plaintiffs need present no evidence at all that there were *any* implementing acts at individual plants. Order at 2 n.1.

At a minimum, Continental needs to present the following evidence to document its defenses:

a) evidence of the economic factors affecting Continental, the can industry, and specific plants from the early 1970's through to the present;

b) evidence on a plant-by-plant basis for each of the 44 plants implicated by the plaintiffs' lists that no acts implementing any "liability avoidance program" were taken at specific plants;

c) evidence of defenses to individual claimants on the grounds that they do not meet one or more of the four *Gavalik* criteria for each and everyone of a group that includes at least 2,284 individuals; and

d) same decision test evidence as to each and every one of a group of claimants that consists of at least 2,284 individuals. As noted in the *Manual for Complex Litigation*, §33.53 at 311, "class members on whose behalf claims for individual relief are presented after a finding of class-wide liability may be treated as subject to discovery."

Continental will not be able to assemble an identification of all of this evidence in the time allotted by the September 14, 1987, order. Thus, the order has the effect of denying the company its due process right to present complete defenses.

3. *Assertions that Continental Has Had Sufficient Time To Prepare Its Defenses Are Not Correct.*

The district court's order and its subsequent denial of Continental's motion for reconsideration rest in part upon the premise that by the present time Continental should have completely prepared its defense. *See* October 15, 1987, Order at 2 ("Continental has had the opportunity to prepare its defense for the past several years.") This assumption is not supported by the record. The action before the court was filed on April 15, 1983. The plaintiffs amended their complaint for the first time on May 25, 1983. Continental filed a Rule 12(b)(6) motion to dismiss in a timely manner on July 18, 1983. The motion was based in part on Continental's assertion that the plaintiffs had failed to exhaust their arbitration remedies. Briefing on the motion was completed on December 8, 1983. More than a year later, the district court issued its opinion denying the motion to dismiss, but requiring plaintiffs to clarify their complaint. Plaintiffs filed a second amended complaint on February 2, 1985, to which the defendants responded with a motion to dismiss filed promptly on March 25, 1985.

Before deciding this motion, the court provided counsel the opportunity to file additional briefs on the applicability of *Jacobson v. Merrill Lynch, Pierce, Fenner & Smith*, 797 F.2d 1197 (3d Cir. 1986), *cert. granted and judgment vacated*, 107 S.Ct. 3204 (1987), by its letter dated August 20, 1986. Continental promptly responded with supplemental briefs in August and September of 1986. Meanwhile, following the court's denial of its motion to dismiss the ERISA counts, Continental filed an answer to the second amended complaint. After oral argument, the court ruled on Continental's March 25, 1985, motion to dismiss the second amended complaint on October 6, 1986. Continental then asked the Court to reconsider or certify its October 6, 1986 decision.

It was only in January of this year that the class was certified by the court. Meanwhile, at the end of 1986, the plaintiffs had filed a motion for partial summary judgment based primarily on documentary evidence it had discovered. After this Circuit issued its opinion in *Gavalik*, the motion was modified to include claims of collateral estoppel. On May 29, 1987, the court issued its order finding that Continental could not contest that it had "developed and adopted a nationwide liability avoidance program as corporate policy" and that "a determinative factor in that action was Continental's intent to deprive plaintiffs of Magic Number pensions." *McLendon*, 660 F. Supp. at 1560. Finally, in its recent October 15, 1987, order denying, in part, the second motion for partial summary judgment, the trial court indicated that Continental was not entitled to defend by demonstrating no implementing acts at particular plants. Order at 2 n.1.

Not surprisingly, until the last few months, the focus of Continental's defense had been on issues of liability at the 30 - 50 plants that had never before been reviewed by a federal district court in connection with the alleged "discriminatory plan" and not on what defenses would be available to the claims of as yet unidentified individual class members to damages that might be owed should Continental be found to be liable.

Moreover, during this time, Continental has been engaged in comprehensive production of documents, having provided more than one million pages in response to requests for discovery, although discovery is not yet complete. In addition, there has been a virtually unbroken line of hearings on procedural issues and other matters not directly related to issues of liability to individual class members. Given the number of issues which have been briefed, argued, and resolved to date in this case, each of which placed demands on counsel's time, it is unreasonable to expect counsel for Continental to have prepared in advance a complete defense as to unidentified individual claimants in anticipation of orders such as those under challenge in this proceeding, which in the experience of defendants' counsel is simply unprecedented.

The broad temporal and geographical scope of the claims before the district court demonstrate the profound difficulties which confront Continental in marshalling its defenses in the time allotted. This nationwide class action involves potential claimants who were laid off from 44 Continental plants during a period that commenced over ten years ago. Preparation of a defense with respect to individual claimants will in many cases require the company to locate, interview, and depose former supervisory and management employees of Continental. Extensive deposition testimony will likely be necessary, as many potential witnesses are located beyond the subpoena power of the district court. While Continental has participated in the depositions of many present and former employees to date, there are literally dozens of present and former employees who yet need to be contacted, interviewed and/or deposed by Continental to respond fully to the trial court's order.

In addition, the personnel files of class members, which may contain evidence which would go to whether any of the four factors listed by the trial court are not met, are scattered over many plants and warehouses around the United States. *See* transcript of oral argument on Oct. 2, 1987, at 41 (Exhibit 15). Prior to the identification of specific names in fact alleged to have been harmed by Continental, it was not practical to locate and collect the files of class members for review by counsel. Continental is engaged in retrieval efforts at the present time.

Although certain defenses may be common to groups of claimants, such as those dismissed from the same plant during a certain period, this does not reduce the size and complexity of the task which faces the attorneys assisting in Continental's defense. Moreover, under the terms of the district court's order, it is imperative that all information within Continental's control be obtained, as the district court's order precludes extensions of time where the defendants are unable to produce information from sources *within their control*. *See* September 14, 1987, Order at ¶ 4(1)(a). The limitations on preparing its defenses that have been imposed by the court's September 14, 1987, order are unconscionable and effectively preclude Continental from properly preparing its defenses. Such orders deny Continental its due process rights.

It is irrelevant to state that Continental has had the alleged opportunity to prepare a "same decision defense" for a period of several years, as Continental has had access to the (provisional) list of definite plaintiff class members only since October 8, 1987, and the provisional list was expanded to include over 500 additional claimants at 18 more plants on October 29. Preparation of defenses with regard to specific individuals was obviously impossible prior to October 8. The January class certification order defined the plaintiff class only in general terms and did not supply the names of specific plants or individual employees. Indeed, from January of 1987 to the present, the plaintiffs have offered widely varying representations as to the size of the class or the number of plants:

October, 1986

Counsel for plaintiffs represents that class members work at 15 or 20 plants. (Collective Exhibit 20, Exhibit A).

January, 1987

Magistrate Hedges mandates that Continental produces documents from 22 numbered plants which plaintiffs considered relevant. (Collective Exhibit 20, Exhibit B).

January 21, 1987

John Jacobs, counsel for the plaintiffs, in a telephone conversation with Dennis P.W. Johnson, identifies 30 additional plants plaintiffs also believe relevant. Affidavit of Dennis P.W. Johnson paragraph 3 (Collective Exhibit 20, Exhibit C).

July 16, 1987

Despite their previous assertions, in their reply to Continental opposition to the plaintiffs' suggested "procedures" order, plaintiffs assert that "the number of plants to be tried is nowhere near 53." Plaintiffs' Reply to Defendants' Memorandum in Opposition to Plaintiffs' Proposed Order Regarding Suggested Procedures for Continued Litigation at 4 n.3 (Collective Exhibit 20, Exhibit D).

July 28, 1987

Plaintiffs' counsel, in a hearing before Judge Sarokin, represents that at least 90% of the class consists of everyone who has been assigned a 249 or 299 status code. Tr. of Proceedings before Judge Sarokin dated July 28, 1987, at 55-56 (Collective Exhibit 20, Exhibit E).

September 2, 1987

Same plaintiffs' counsel, in a hearing before Magistrate Hedges, represents that the class is more extensive than the 249 or 299 codes, or any of the other three codes that plaintiffs contend designated an employee as permanently laid off for the purposes of definition of the class. Tr. of Proceedings before Magistrate Hedges, dated September 2, 1987, at 26-27 (Collective Exhibit 20, Exhibit F).

September 11, 1987

Plaintiffs send defendants' counsel a list of 2,547 "249/299" designees prepared from computer tapes provided by Continental in anticipation of the meeting between the parties' computer experts to evaluate the discrepancies between plaintiffs' and Continental's lists. September 11, 1987, Letter from J. Jacobs to M. Abernathy (Collective Exhibit 20, Exhibit G).

October 2, 1987

In their opposition to Continental's motion for reconsideration, plaintiffs note that they have already provided Continental with a listing of more than 2,000 employees designated permanently laid off which Continental could use to begin preparing its response to Sarokin's order of September 14, 1987. Plaintiffs' Brief in Opposition to Defendants' Motion for Reconsideration, at 10 n.3 (Collective Exhibit 20, Exhibit H).

October 8, 1987

Plaintiffs provide the court and Continental with a list of 1,746 names from 26 plants whom the plaintiffs claim satisfy the four elements of *Gavalik*. October 8, 1987, Letter from Plotkin to Judge Sarokin (Collective Exhibit 20, Exhibit I).

October 29, 1987

Plaintiffs provide the court and the defendants with a list of 2,284 names from 44 plants whom they claim satisfy the four elements (Collective Exhibit 20, Exhibit J).

These constant changes in the size of the class and the number of plants involved make it unreasonable to expect the preparation of Continental's defenses to have progressed to within two months of completion, as the district court's order implicitly contemplates.

4. *Continental Has Been Precluded from Presenting Any Evidence as to Certain Defenses.*

The court's September 14, 1987, order states that "[e]ach person as to whom said four elements (or any modification thereof which the court may determine) are established shall be entitled to be made whole under Section 510 of ERISA, 29 U.S.C. §1140, for any loss or injury sustained, including the recovery of damages and the receipt of such other relief as may be appropriate." The four elements (*Id.* at 7) are the four taken from the last pages of this Court's opinion in *Gavalik v. Continental Can Co.*, 812 F.2d 834 (3d Cir. 1987), *pet. for cert. filed*, 55 U.S.L.W. 3752 (U.S. April 15, 1987). The order implements a basic misunderstanding of the *Gavalik* decision on the part of the district court.

In *McLendon* Judge Sarokin held that Continental was collaterally estopped from arguing that its alleged "liability avoidance plan" was not a violation of Section 510 of ERISA, 29 U.S.C. §1140. His September 14, 1987, order however, attaches to this erroneous finding an impermissible presumption that all layoff decisions at issue in all of Continental plants throughout the United States are improperly motivated: pursuant to the September 14, 1987, order, any plaintiff from any Continental location claiming that he satisfies the four Gavalik criteria apparently becomes entitled to compensation unless Continental can show that the same decision would have occurred in any event. September 14, 1987, Order at 2 (Collective Exhibit 1). Continental can defeat this claim only by showing same decision evidence; it is not allowed to show that the plan was not implemented as to any particular plant.

Under a proper interpretation of *Gavalik*, any presumption inuring to individual plaintiffs as to entitlement to damages arises only (if at all) after the plaintiffs have proven implementing acts in furtherance of the alleged illegal policy. It does not arise from any plan in and of itself. If, through the use of offensive collateral estoppel, the plaintiffs are deemed to have proven the existence of the "illegal plan" (as is held by Judge Sarokin's May decision) plaintiffs are entitled to injunctive relief at the most.

Yet, on October 15, 1987, Judge Sarokin (aside from affirming his September 14 "procedures" order) also denied summary judgment as to certain named plaintiffs from two plants. The plaintiffs, however, as in the September 14 procedures order, were allowed to summarily "skip" the liability stage of the trial, and the court allowed them to establish individual entitlement merely through a showing that they satisfied the four criteria enumerated by *Gavalik*. The trial court thereby both eliminated the requirement of proof of implementation by the plaintiffs and prevented Continental from demonstrating that no implementation occurred at particular plants.

The effect of the court's orders on Continental is to preclude it from asserting any defenses showing that no implementing acts under the alleged liability avoidance plan affected a group of, or individual, employees. Thus, the company has been denied its due process rights, which denial must be corrected by this court.

B. *Violation of the Defendants' Right to a Jury Trial of Its Legal Claims Warrants Issuance by this Court of a Writ of Mandamus to the District Court of New Jersey.*

1. *Defendants Have A Right To A Jury Trial For Their RICO Claims.*

In *McLendon* both the plaintiffs and the defendants requested a jury trial on the RICO claims in a timely manner. The plaintiffs made a request in their original and subsequent complaints (Exhibit 2 at 33); the defendants in their answer (Exhibit 3 at 20).

Civil RICO claims have been held to be legal in nature and thus provide a right to a jury trial. *NSC Int'l. Corp. v. Ryan*, 531 F. Supp. 362, 363-64 (N.D. Ill. 1981) (action seeking treble damages under 18 U.S.C. §1964(c) for persons injured by violations of RICO was legal in nature and that therefore the seventh amendment required a jury trial on demand); *Eisenberg v. Gagnon*, 564 F. Supp. 1347, 1353-54 (E.D. Pa. 1983) ("RICO creates a new legal wrong for which 'the closest analogy is to an action in tort.' ") (quoting *Ryan*, 531 F. Supp. at 363).

2. *Plaintiffs' RICO and ERISA Claims Are Based On The Same Facts.*

In their second amended class action complaint, the plaintiffs have asserted that

> "[t]his action arises from an unlawful and fraudulent Capping Program initiated by defendant TCG-I — a secret, computer assisted program designed to deprive defendants' employees of pension benefits under a pension plan, in violation of the Racketeer Influenced and Corrupt Organizations statute ("RICO") and the Employee Retirement Income Security Act of 1974 ("ERISA").

Exhibit 2 at 1-2.

Count II of the second amended complaint which is titled "For Damages Caused by Defendants' Violations of Sections 1962(a) and (c) of RICO" requests "[t]hat each plaintiff and member of the class who has sustained damages as a result of defendants' unlawful conduct complained of herein receive judgment in the amount of threefold such damages." Exhibit 2 at 29-30. Count IV, in parallel with Count II, is titled "For Damages Caused by Defendants' Violations of Section 510 of ERISA" and requests "[t]hat each plaintiff and member of the class who has suffered financial damage in whole of in part as a result of defendants' unlawful conduct alleged above receive judgment in the amount of such damage, including but not limited to backpay for all wages lost, for all pension benefits lost, and for all other employment benefits lost." Exhibit 2 at 32. As noted above, the ERISA and RICO claims allegedly arise from the same series of events. The complaint seeks recovery under RICO and ERISA for those who have sustained damages from the same set of actions. A bench finding that a plaintiff has suffered recoverable damages under ERISA will necessarily address the same facts that may give rise to a right of recovery under RICO.

3. *Judge Sarokin Has Determined To Try The Non-Jury Issues First.*

The defendants asked the court to try those factual issues that pertain to both the RICO and ERISA claims together in front of a jury so as to avoid bench findings what will destroy the defendants' right to a jury trial. Judge Sarokin has denied this request.

> Finally, the court rejects Continental's argument that the order, by requiring a bench trial of the ERISA claims prior to a jury trial of the RICO claims, violates Continental's constitutional rights. Given the complexity of this matter, the court concludes that it possesses the discretion to proceed in this fashion, preserving Continental's right to a jury trial as to the RICO claims. Continental has no right to a jury determination on plaintiffs' ERISA claims.

October 15, 1987, Order at 2-3 (Collective Exhibit 1).

4. *Beacon Theatres requires that jury issues be tried first.*

The Supreme Court in *Beacon Theatres v. Westover*, 359 U.S. 500 (1959), found that the seventh amendment required that "*only under the most imperative circumstances, circumstances which in view of the flexible procedures of the Federal Rules we cannot now anticipate, can the right to a jury trial of legal issues be lost through prior determination of equitable claims*." *Id*. at 511. The petitioner in that case had asked the Ninth Circuit to issue a writ of mandamus to require the Southern District of California to vacate orders that denied petitioner the right to a jury trial of legal issues. The Circuit had denied the writ, reasoning that "it was not an abuse of discretion for the district judge . . . . to try the equitable cause first even though this might, through collateral estoppel, prevent a full jury trial of the counterclaim and cross-claim which were as effectively estopped as by an equity injunction." *Id*. at 505. The Supreme Court reversed.

The important teaching of *Beacon Theatres* on the strength of the right to a jury trial has been affirmed in subsequent cases: "Beacon Theatres requires that any legal issues for which a trial by jury is timely and properly demanded be submitted to a jury." *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 473 (1962); *see also GTE Sylvania, Inc. v. Continental TV, Inc.*, 537 F.2d 980, 986 n.7 (9th Cir. 1976); *Amoco Oil Co. v. Torcomian*, 719 F.2d 1099, 1102 (3d Cir. 1983); *E.E.O.C. v. Corry Jamestown Corp.*, 719 F.2d 1219, 1224 (3d Cir. 1983). *Accord*, 9 C. Wright & A. Miller, Federal Practice & Procedure §2338 at 134 (1971) ("[i]f, however, issues of fact are common to both the legal and the equitable claims and a jury has been demanded on the issues material to the legal claim, a jury must be permitted to determine these issues prior to decision of the equitable claim.")

Subsequent decisions have refined the broad policy statement of *Beacon Theatres* by identifying exceptions to the application of the policy, but none has rejected it and none of the judicially articulated exceptions is pertinent to this matter. *See, e.g., Katchen v. Landy*, 382 U.S. 323, 336 (1966) (congressional intention to provide a procedure for expeditious determination of claims in bankruptcy without intervention of a jury constituted exceptional circumstance that took case out of *Beacon Theatres* doctrine); *United States v. Reynolds*, 397 U.S. 14, 18 (1970) (no jury trial available for eminent domain proceedings);

and *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 337 (1979) (*Beacon Theatres* doctrine did not preclude equitable decision in one proceeding from having collateral estoppel effects in separate subsequent legal proceeding.)

The plaintiffs in the action have asserted that the decision of the Supreme Court in *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979) disposes of Continental's arguments for first holding a jury trial of issues common to the RICO and ERISA claims. A close review of *Parklane* and *Katchen v. Landy*, 382 U.S. 323 (1966) (a case that *Parklane* relies on), demonstrates that those cases cannot be read to limit that right in the context of the present action. In *Katchen*, the same issues — whether a creditor has received a preference and, if so, its amount — were presentable either as equitable issues in the bankruptcy court or as legal issues in a plenary court. The petitioner argued that the bankruptcy court should stay its own proceedings and direct the bankruptcy trustee to commence a plenary suit so as to preserve petitioner's right to a jury trial. The Court rejected the petitioner's argument, finding that, in order to implement the congressional intent embodied in the Bankruptcy Act, the bankruptcy court could adjudicate the matter. The Court noted that:

> Both *Beacon Theatres* and *Dairy Queen* recognize that there might be situations in which the Court could proceed to resolve the equitable claim first even though the results might be dispositive of the issues involved in the legal claim.

Id. at 335.

In *Parklane*, the Court determined that the results of a *separate* equitable court proceeding could have collateral estoppel effects on a subsequent legal adjudication. The Court explained its finding as an extrapolation of its finding in *Katchen* that "an equitable determination can have collateral-estoppel effect in a subsequent legal action and that this estoppel does not violate the Seventh Amendment." *Id.* at 335.[5]

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[5] In opposing Continental's request for a jury trial first, plaintiffs have relied on dicta from *Parklane Hosiery Co. Inc. v. Shore*, 439 U.S. 322 (1979)

The present action falls squarely in the territory that continues to be encompassed by the *Beacon Theatres* rule, the body of cases with both legal and equitable claims arising from the same events. Thus, *Beacon* and its progeny require first adjudication of the matters common to the plaintiffs' ERISA and RICO claims before a jury. The continued viability of this *Beacon* doctrine after *Parklane* is attested to by circuit court cases decided after *Parklane*, including the First Circuit's affirmation in a recent decision that "where, as here, legal and equitable issues are presented in a *single case*, absent extraordinary circumstances, the right to a jury trial cannot be lost through prior court determination of the equitable claims." *Marshak v. Tonetti*, 813 F.2d 13, 16 (1st Cir. 1987) (emphasis added), citing *Beacon Theatres*, 359 U.S. 500. *See also Amoco Oil Co. v. Torcomian*, 722 F.2d 1099, 1102 (3d Cir. 1983); *E.E.O.C. v. Corry Jamestown Corp.*, 719 F.2d 1219, 1224 (3d Cir. 1983); *Gnossos Music v. Mitken, Inc.*, 653 F.2d 117, 119 (4th Cir. 1981); *Cotten v. Witco Chemical Corp.*, 651 F.2d 274, 276 (5th Cir. 1981) (J. Tate, concurring), *cert. denied*, 455 U.S. 909 (1982); *Bowles v. Bennett*, 629 F.2d 1092, 1095 (5th Cir. 1980).

5. *Judge Sarokin Had No Discretion To Avoid A Jury Trial On The Basis Of The Complexity Of The Case.*

As reviewed above, *Beacon Theaters* mandates that common issues be tried before a jury first. Moreover, a judge lacks discretion to deny a motion for a jury trial on the grounds that the issues involved are too complex. *See generally* 5 J. Moore, Moore's Federal Practice ¶38. 11[10] (2d ed. 1987). In *In re U.S.*

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which refers to the premise of *Beacon Theatres* as "a general prudential rule" *Id.* at 334. The case addressed the question of the collateral estoppel effects of an equitable determination on a subsequent separate legal proceeding, not a single proceeding with both legal and equitable claims. The Supreme Court has noted that " '[i]t is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used.' " *Zenith Radio Corp. v. United States*, 437 U.S. 443, 462 (1978), quoting the decision below, 562 F.2d 1209 at 1213 (CCPA 1977), which in turn quoted *Cohens v. Virginia*, 6 Wheat. 264, 399, 5 L. Ed. 257, 290 (1821).

Financial Securities Litigation, 609 F.2d 411, 429-30 (9th Cir. 1979), the Court declined to apply a "complexity test" to the right to jury trial in a complex securities case. The Third Circuit has ruled in *In re Japanese Electronic Products Antitrust Litigation*, 631 F.2d 1069, 1086 (3d Cir. 1980) that in exceedingly complex cases, a jury trial may in fact infringe upon due process rights to a fair trial. However, the court described the degree of complexity required as follows:

> It is not enough that trial to the court would be preferable. The complexity of a suit must be so great that it renders the suit beyond the ability of a jury to decide by rational means with a reasonable understanding of the evidence and applicable legal rules. . . *Due process should allow denials of jury trials only in exceptional cases*.

631 F.2d at 1088 (emphasis added). Moreover, the court stated that the district court must "make explicit findings on the dimensions of complexity when it denies a jury trial in an action at law on grounds of complexity." *Id.* at 1089. *See also Cotten v. Witco Chemical Corp.*, 651 F.2d 274, 276 (5th Cir. 1981), *cert. denied*, 455 U.S. 909 (1982) (reversing trial court's denial of jury trial on basis of finding that complexity of the case would make it "most difficult" for a jury to reach a rational decision).

The court has not made any specific findings on the complexity of the present case, and if it were to do so would find itself far short of the standard in the Japanese electronics antitrust action. In any event, such a finding would be incompatible with the court's concurrent finding that the case is apparently not so complex that Continental cannot collect and specify to the court all the evidence it intends to use in the trial within the impossibly short period of 30 days.

6. *Judge Sarokin Could Not Deny Continental's Right To A Jury Trial On The Basis Of Any "Waiver" Of Collateral Estoppel*.

In the course of oral argument on July 28, and in a letter dated August 21, counsel for plaintiffs offered to "waive" any collateral estoppel effects which might result from trying the

ERISA claims to the court prior to the trial of the RICO claims to a jury. *See* Exhibit 21 (letter dated August 21, 1987).[6]

Although collateral estoppel is an affirmative defense which must be asserted under Fed.R.Civ.P.8(c), plaintiffs offered no support for the proposition that voluntary waiver of the preclusive effect of issues previously decided by a judge is sufficient to protect Continental's constitutional right to a jury trial.

If one accepted plaintiff's "waiver," then the jury, in deciding the RICO claims, might conceivably arrive at findings of fact that are inconsistent with Judge Sarokin's bench findings as to the ERISA claims.

Moreover, courts in this Circuit and in the 9th Circuit have found that under *Beacon Theaters* the prior decision of the jury as to common facts will be *binding* on a court's subsequent equitable determination, thus ensuring consistent findings of fact. *None* of them suggest that a party's jury rights might also be adequately protected by "preserving" the right to a jury trial by the simple expedient of a waiver to follow a bench trial. Instead, they require a jury trial of the legal issues to be held *first*.

For example, the Ninth Circuit in *GTE Sylvania, Inc. v. Continental T.V., Inc.*, 537 F.2d 980 (9th Cir. 1976), in a case involving both legal and equitable claims, found that:

> The trial judge's finding on this point appears to be in conflict with the finding of the jury that Maguire and Sylvania were not involved in any contract, combination, or conspiracy to enforce the location restriction. When issues common to both legal and equitable claims are to be tried together, the legal issues are to be tried first, *and the findings of the jury are binding on the trier of the equitable claims. Beacon Theatres v. Westover*, 359 U.S. 500, 79 S.Ct. 948, 3 L.Ed.2d 988 (1959). We therefore rely upon the findings of the jury if they appear to be inconsistent with findings of the trial judge.

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[6] It is not clear whether the district court adopted this offer as part of its rationale. The district court may have done so implicitly when it stated that defendants' rights to a jury trial would be preserved as to the RICO claims. October 15, 1987, Order at 3.

Id. at 986 n.7 (emphasis added). In *Weiss v. York Hosp.*, 548 F. Supp. 1048 (M.D. Pa. 1982), another case with both equitable and legal claims, the district court found that:

> The parties and the Court are in agreement that they are entitled to a jury determination of the factual issues involved in the claims of Weiss and the Plaintiff class. The parties and the Court are further in agreement that the jury's findings are *binding on the Court* with respect to the Court's determination of entitlement to equitable relief." (Cite omitted.) (emphasis added)

Id. at 1054. On appeal this Circuit noted without comment that the court had adopted the jury's findings of fact "by which it considered itself bound" in determining whether or not to provide injunctive relief. *Weiss v. York Hospital*, 745 F.2d 786, 792 (3d Cir. 1984), *cert. denied*, 470 U.S. 1060 (1985). Finally, in *Five Platters, Inc. v. Purdie*, 419 F.Supp. 372, 376 (D. Md. 1976), the Maryland District Court, in a case with both legal and equitable claims viewed "the verdict [of the jury] as binding on those common issues which are submitted to the jury for resolution."[7]

In the present case, the judge proposes to try the same issues twice, adding unneeded complexity, wasting resources of the court and parties alike, and violating the mandate of *Beacon Theaters* and its progeny. The trial court's order is in flagrant disregard of Continental's right to a jury trial and must be corrected by this Court.

---

[7] The First Circuit has found that a judge could lawfully make independent findings of fact *after* the jury made its determination. *Wallace Motor Sales v. American Motor Sales Corp.*, 780 F.2d 1049, 1066 (1st Cir. 1985); *Turner v. Johnson & Johnson*, 809 F.2d 90, 102 (1st Cir. 1986).

IV. *CONCLUSION*

The trial court ignored the outstanding discovery orders which indicate that Continental is still months away from completing all permissible discovery. The trial court ignored its commitment to provide counsel a draft proposed litigation schedule and an opportunity to comment thereon. The trial court has, rather, issued a series of orders on September 14 and October 15, 1987, which (1) give Continental only until November 30 to prepare its total defense for nearly 2,300 plaintiffs identified during the ~~month of October 1987, (2) prevent~~ Continental from demonstrating that there has been no implementation of a "plan" at particular plants and hence no liability, and (3) deny Continental its Constitutional right to a jury trial. A request for reconsideration of the obvious due process problems in the arbitrary time limits imposed on Continental was flatly rejected. In short, in issuing the orders, the trial court has ignored the teaching of the Supreme Court, of this Circuit and of the United States Constitution and has seriously abused its discretion.

Accordingly, petitioners respectfully request that this Honorable Court exercise its authority to issue a writ of mandamus directing the Honorable H. Lee Sarokin, Judge of the United States District Court for the District of New Jersey to vacate the opinions and orders entered by the district court on September 14 and October 15, 1987, in *McLendon v. Continental Group, Inc., et al.*, Civ. No. 83-1340, that have the effect of depriving petitioners of their constitutional rights to due process and to a jury trial and to provide the detailed relief requested on pages 4-5 above.

Dated: November 12, 1987

Respectfully submitted,

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No. 87-911

In The

Supreme Court of the United States

October Term, 1987

THE CONTINENTAL GROUP, INC., CONTINENTAL CAN COMPANY, INC., CONTINENTAL PACKAGING COMPANY, INC., and KMI CONTINENTAL INC.,
Petitioners,

v.

CECIL McLENDON, DON VANDERTULIP, JIMMIE CARTHARN, JR. and KONRAD TROJNIAR, on their own behalf and on behalf of all others similarly situated,
Respondents,

and

HONORABLE H. LEE SAROKIN, United States District Judge for the District of New Jersey,
Nominal Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

1. Will certiorari lie from the denial of a writ of mandamus where (a) the court below has not addressed the questions presented by the petition for certiorari and (b) the petition does not assert a claim of abuse of discretion in the denial of the writ of mandamus?

2. After a determination of liability in favor of a plaintiff class on an admittedly equitable (nonjury) claim, may a trial court proceed to conclude the remedy phase of that claim for class members prior to resolving independent legal claims triable by jury?

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and

HONORABLE H. LEE SAROKIN, United States District Judge for the District of New Jersey,
Nominal Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION

Respondents submit this brief to demonstrate that the petition for writ of certiorari should be denied.

COUNTER-STATEMENT OF THE CASE

Petitioners contest a decision of the Third Circuit rejecting their petition for the extraordinary relief of mandamus. In its entirety, that decision states: "The foregoing Motion is denied" (Pet. App. A-1). Petitioners had filed the petition to seek review of various of the trial court's interlocutory rulings, rulings which they admit were not subject to appeal.

The rulings followed the trial court's entry of a partial summary judgment that petitioners had committed a classwide violation of ERISA's Section 510, 29 U.S.C. §1140. (The petition does not challenge the propriety of that liability judgment.) The rulings established the procedures by which the trial court would fashion the relief to remedy the classwide violation. All of this is under a statute which does not provide for trial by jury; petitioners concede that a Section 510 action is purely equitable in nature.

Congress enacted ERISA in 1974. While most of ERISA's provisions are addressed to protecting the interests of employees who have already become entitled to benefits under an employee benefit plan, Congress also included the quite distinct prohibition that appears in Section 510, *viz.*, that "it shall be unlawful for any person to discharge . . . or discriminate against a participant . . . for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan. . . ."

During the 1970s, petitioner Continental Can Company (hereinafter "Continental") adopted a company-wide program to accomplish precisely what Section 510 forbids. The facts of that program set forth in the following paragraphs are taken from the Third Circuit's opinion in *Gavalik v. Continental Can Co.*, 812 F.2d 834 (3d Cir.), *cert. denied*, ____ U.S. ____, 108 S.Ct. 495 (1987). It was the decision in *Gavalik* which, through the principles of collateral estoppel, provided the basis for the partial summary judgment in the instant case. The Solicitor General has previously told this Court in an *amicus* brief filed in *Gavalik*, that "[t]here is no question that Section 510 prohibits precisely the kind of scheme that Continental devised here."[1]

1. Called a "liability avoidance" program in Continental's internal documents, the program's purpose was to prevent employees who had not already qualified for certain pensions ("shutdown pensions") from ever qualifying for those pensions. This was done by removing employees from the workforce before they had accumulated the age and service necessary to vest entitlement to such pensions. (*Gavalik* at 840.)

2. Through an elaborate computer study, Continental identified, at the plants with greatest potential pension liability, those employees whose combined age and service did not yet qualify them for shutdown pensions (*id.* 841).

3. A "cap" was placed on the size of the workforce at such plants, limiting the workforce almost exclusively to employees who *already* had qualified for shutdown pensions (*id.* 840).

4. Employees outside the cap were laid off from work, and were designated in the Company's records (albeit they were not told this) "permanently laid off." An employee

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[1] P. 18 of Brief For The United States As Amicus Curiae, filed in November 1987 in No. 86-1659 in response to the Court's invitation.

so designated was not to be recalled to work under any circumstances without the approval of top management at corporate headquarters. (*Id.* 840.)

5. A "red flag" system was instituted to assure that employees designated "permanently laid off" would not inadvertently be recalled to work and thus allowed to qualify for shutdown pensions (*id.* 841).

6. Whereas prior to institution of this program plant managers had been instructed to adjust employment levels to whatever was necessary to accomplish the business available to the plant, the volume of business at the plant was now adjusted to accommodate the cap on employment levels dictated by the "liability avoidance" program. Additional work, if it could not be accomplished by having already-qualified employees work overtime, was to be referred to other plants of the Company or contracted out. (*Id.* 840.)

7. The Company had by design kept the existence of its liability avoidance program secret from the employees and their union (*id.* 840).

The Pittsburgh (Gavalik) Litigation

The *Gavalik* litigation is a class action brought on behalf of employees of Continental's Pittsburgh plant. Following a lengthy trial, the district court in Pittsburgh found that Continental in fact had adopted the company-wide liability avoidance program described above and had implemented it at the Pittsburgh plant, and in adopting and implementing the program had been motivated by a desire to prevent the employees from qualifying for shutdown pensions (*id.* 842). Nevertheless, the district court entered judgment for Continental, finding that, insofar as the Pittsburgh plant was concerned, the Company had also been motivated by declining business and that the plaintiffs had failed to prove that they would not have been laid off even in the absence of the pension-avoidance motive (*id.* 842).

The court of appeals reversed, and remanded for further proceedings. The court found two fundamental errors in the district court's disposition of the merits. First, the court of appeals reasoned that the district court's findings established that Continental had engaged in a classwide violation of Section 510. The district court had found that Continental developed a program to make employment decisions based upon a statutorily forbidden criterion (*id.* 856-57). Citing and following *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977), the court of appeals held that Continental's discriminatory program was a classwide violation that entitled the class to an injunction against the program's continued operation (*Gavalik* at 857).

Second, as to the plaintiff class members' entitlement to individual relief, the court of appeals ruled that the district court had erred by placing the burden on plaintiffs to prove that but for Continental's illegal program they would not have been laid off. (*Id.* 859-65.)

The Present Litigation

The *Gavalik* litigation, as indicated, involves employees of only one of Continental's plants: the Pittsburgh plant. The present lawsuit, in which plaintiffs assert both ERISA and RICO claims, was brought on behalf of employees covered by the same Pension Agreement at more than fifty other Continental plants. A plaintiff class was certified, encompassing employees of those plants. As of this date, more than 2,000 such employees have been identified as class claimants.

The *Gavalik* findings, through the doctrine of collateral estoppel, enabled the trial court in the present action to enter summary judgment that Continental's company-wide liability avoidance program, which is involved in both cases, constituted a classwide violation of ERISA. *McLendon v. Continental Group, Inc.*, 660 F.Supp. 1553 (D.N.J. 1987). Thus, as to the ERISA claim, all that remained was for the trial court to fashion appropriate equitable relief for the class consisting of more than 2,000 individuals. The trial court determined it would address these equitable (nonjury) remedy questions prior to trial of plaintiffs' RICO claims to a jury.

The trial court made this determination, as petitioners concede (Pet. 11-12), after plaintiffs agreed that the results of the bench trial of the ERISA remedial phase would have no collateral estoppel effects as to the RICO claims.

On this record, and noting defendants' nonentitlement to a jury trial under ERISA and the daunting complexity which would occur were a jury asked to determine in a single trial not only 2,000 ERISA remedial claims but 2,000 RICO liability claims as well, the trial court rejected petitioners' request for such a single jury trial (Pet. App. A-18).

Petitioners thereupon moved the Third Circuit to issue the extraordinary relief of mandamus. Without inviting any response to the motion, the Third Circuit disposed of it in one line: "The foregoing Motion is denied."

REASONS FOR DENYING THE WRIT

For three reasons, certiorari is inappropriate here. First, petitioners cannot show that the court of appeals decided the questions they seek to present. Indeed, the court merely denied their petition for mandamus. That remedy is so extraordinary that a petitioner must satisfy a number of hurdles—and must do so clearly and indisputably—before he can claim it. It is likely that Continental's petition for mandamus foundered on one of these preliminary issues and, thus, the decision below would raise none of the issues petitioners portray as presented here.

Second, even had the Third Circuit clearly addressed the jury contentions and thus determined the questions petitioners describe, the unique facts of this case raise a host of subsidiary issues depriving it of any general import. Petitioners concede not only the summary, classwide liability judgment. They concede that all that remains on plaintiffs' ERISA claims is fashioning the equitable relief which will remedy that violation. They concede that the ERISA statute does not provide for trial by jury of these claims. They concede, finally, that the class members will invoke no collateral estoppel effects from any ERISA-remedy findings in trying the RICO claims. These facts and the unique posture of this case cause the instant petition to be without constitutional import.

Finally, were petitioners able to isolate a constitutional issue, this Court's decision in *Parklane* would resolve it. *Parklane* taught that the principles which order the sequence of legal and equitable trials are "no more than a general prudential rule." *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 334 (1979). Given the complexity of the task that remains in determining the ERISA remedies for the 2,000-plus class members, given the enormous additional complexity which would result from combining this task with the class members' RICO claims in a single jury trial, and given that these class members have waived any claim of issue preclusion, the trial court's determination to fashion the ERISA remedies prior to dealing with the RICO claims clearly conforms with that prudential rule.

I.

PETITIONERS HAVE NOT DEMONSTRATED THAT THE COURT OF APPEALS DECIDED THE QUESTIONS THEY CLAIM TO BE PRESENTED.

The court of appeals disposed of petitioners' petition for a writ of mandamus in five words: "The foregoing Motion is denied." Mandamus is a "drastic" remedy, justified only in "exceptional circumstances, amounting to a judicial usurpation of power." *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 34, 35 (1980). Mindful of its extraordinariness, courts have crafted a number of strict prerequisites a litigant must satisfy before he can claim the writ. The litigant must show he has no other available remedy and that his entitlement to mandamus is both clear and undisputable. *Id.* at 35; *Bankers Life and Casualty Co. v. Holland*, 346 U.S. 379, 384 (1953).

The five words of the Third Circuit's decision do not disclose why the court denied the petition for a writ of mandamus. Most probably, the court determined that petitioners had not clearly and indisputably satisfied one or another of the myriad of prerequisites.[2] Were that the case, then the instant petition for a writ of certiorari would raise neither of the questions it purports to present. Indeed, the only proper petition would be one presenting a question which this petition does *not* pose: Did the Third Circuit abuse its discretion in refusing to grant the extraordinary writ of mandamus on the particular and unique facts of this case?

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[2] The Third Circuit denied the petition within days of its filing and without seeking a response from the plaintiffs. This summary treatment strongly suggests that the court reached its decision without reaching the merits.

Since petitioners cannot even show that the questions they would present to this Court were decided below, certiorari is inappropriate.

II.

THE UNIQUE FACTS OF THIS SITUATION DO NOT PRESENT ANY CONSTITUTIONAL QUESTION.

The uniqueness of this situation is readily apparent. It is a major employment discrimination class action, involving thousands of class members, in which the class achieved summary judgment as to their employer's liability. Thus, only remedial determinations remain before the ERISA action is complete. Plaintiffs have foreclosed the possibility that ERISA remedial findings would prejudice petitioners' RICO defense through their agreement that they will not invoke collateral estoppel based on those findings with respect to their RICO claims.

No constitutional issue arises from these singular facts. The ERISA action is purely equitable and, taken alone, carries no right to a jury trial. Since petitioners admit this much, they are forced to contrive an intricate argument to support their jury demand: though the plaintiffs have waived collateral estoppel, it is possible that the trial court will enter ERISA remedial findings that do not conform entirely to the subsequent RICO jury verdicts. Such inconsistency, petitioners conclude, offends against the sound administration of justice.

Three considerations undermine this argument. First, as the petition itself acknowledges, although obscurely, petitioners' question concerning the sound administration of justice is not a constitutional question. *See* discussion of *Heyman* decision in section III.A *infra*. No matter how ingeniously petitioners attempt to cloak their argument with a constitutional mantle, it is not an argument about petitioners' constitutional right to a jury trial—none exists here.

Second, petitioners' argument assumes two future events that may never occur. Petitioners assume, for one thing, that there will be RICO jury verdicts. But any number of possibilities could prove the error in that assumption. Either before or after the ERISA remedy trial, the action could resolve through settlement. Petitioners next assume that any subsequent RICO verdicts would be inconsistent with the ERISA remedial findings. Not only is this wholly speculative, there is little chance of such inconsistency. Even a no-damage verdict would not on its face conflict with an ERISA remedy. A verdict for petitioners could mean that the jury found no liability under RICO or that a class member, though establishing liability, had not established damages.

Beyond these flawed assumptions lies one final error in the argument on which petitioners base their claim to mandamus. Mandamus issues only where no other remedy exists. Here, however, another remedy exists even if (1) inconsistent findings arose and (2) a court concluded that sound jurisprudence could not withstand the inconsistency. That remedy, of course, is a normal appeal. The availability of appeal provides petitioners their adequate remedy and precludes mandamus.

In the final analysis, the unique circumstances of this case make it a poor vehicle to resolve questions of a wider scope. On the contrary, review could do little more than settle the precise matters at issue here.

III.

THERE IS NO CONSTITUTIONAL QUESTION AND NO RELEVANT CONFLICT AMONG THE CIRCUITS.

The factors discussed in sections I and II above establish that no constitutional question is presented by the petition. There are other reasons as well.

A. The *Heyman* Decision, Relied On By Petitioners, Shows That No Constitutional Question Is Presented.

That no constitutional question is presented here is shown by the petition itself. At page 14, it highlights the Second Circuit's decision in *Heyman v. Kline,* 456 F.2d 123 (2d Cir.), *cert. denied,* 409 U.S. 847 (1972). That decision, the petition acknowledges, held that there was "no infringement upon the seventh amendment guarantee" there because, as petitioners put it, "the appellee . . . agreed to waive any collateral effects of the lower court's findings as to those claims to be tried by a jury."

The facts of the instant case present an *a fortiori* situation, since here the respondents have agreed to such a waiver *prior* to any trial, while in *Heyman* the waiver was not offered until the case had reached the court of appeals *after* trial.[3]

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[3] Although the point is immaterial with respect to the instant petition, we would point out that the *Heyman* ruling that, notwithstanding that no constitutional question was presented, the equitable and legal claims in that case were still required to be tried together because of "the need to avoid conflicting adjudications (involving the same parties)" is readily explainable because, unlike

(Footnote continued on following page)

B. There Are Broader Reasons Why No Constitutional Question Or Relevant Conflict Among The Circuits Is Presented.

On a broader basis, the most important question to be asked to determine if such a conflict or constitutional question is presented here is whether the court decisions relied on by petitioners occurred before or after this Court's decision in *Parklane Hosiery Co. Inc. v. Shore*, 439 U.S. 322 (1979).[4] The instant petition impliedly concedes the importance of *Parklane*, since its only references to that decision, at pp. 8-9, fail to address the aspects of the decision which are dispositive here (and which respondents emphasized in the district court as being dispositive).

Under *Parklane*, plaintiffs' agreement in the district court that the findings in the ERISA remedies trial would not have any binding or estoppel effect as to the RICO claims concludes the issue. This Court went to some length in *Parklane* to make it clear that a trial court is not without discretion to determine the sequence of trials, characterizing the rule enunciated in *Beacon Theatres* as "no more than a general prudential rule." *Id.* at 334. On this point, see *Ritter v. Mount St. Mary's College, supra*, at 991. Moreover, the Court made clear the inapplicability

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[3] *continued*
the situation in the instant case, the equitable and legal aspects in *Heyman* pertained to the same claims, in effect. In that case, both the plaintiff's claim and the defendant's counterclaim were for breach of the same contract, making directly conflicting determinations a very real possibility.

[4] On the decisive importance of *Parklane*, see *Ritter v. Mount St. Mary's College*, 814 F.2d 986, 990-91 (4th Cir.), *cert. denied*, ____ U.S. ____, 108 S.Ct. 260 (1987).

of the decisions in *Beacon Theatres* and *Dairy Queen*,[5] relied on by petitioners, to the instant facts, pointing out that the objective of those decisions was to prevent collateral estoppel effect from depriving a party of the right to a jury trial (*Parklane* at 334):

> Recognition that an equitable determination could have collateral-estoppel effect in a subsequent legal action was the major premise of this Court's decision in *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 79 S.Ct. 948, 3 L.Ed.2d 988. . . .
>
> * * * *
>
> It is thus clear that the Court in the *Beacon Theatres* case thought that if an issue common to both legal and equitable claims was first determined by a judge, relitigation of the issue before a jury might be foreclosed by *res judicata* or collateral estoppel. To avoid this result, the Court held that when legal and equitable claims are joined in the same action, the trial judge has only limited discretion in determining the sequence of trial and "that discretion . . . must, wherever possible, be exercised to preserve jury trial." *Id.* at 510, 79 S.Ct., at 956. [Footnote omitted.][6]

This was the rule that the Court characterized as "no more than a general prudential rule." That rule, of course, is inapplicable here because of respondents' agreement as to no collateral-estoppel effect from the court's ERISA findings.

However, the rule would not have required a jury trial first even if no such agreement had been proffered, because any "prudential" determination of trial sequence in the case at bar would support the district court's decision to bench-try the remedial phase of the ERISA claims first.[7] In this connection, *Parklane* also states expressly that there are situations where it is proper to give an equitable determination collateral-estoppel effect with respect to legal claims—and that is exactly what the Court sanctioned in *Parklane*. It would seem self-evident that if collateral-estoppel effect were approved in *Parklane*, where there were no special problems of complexity and the like, the facts here present a true *a fortiori* situation. On this point, see *Ritter v. Mount St. Mary's College*, *supra*, at 990-94.

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[5] *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959); *Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1962).

[6] The Court's footnote to this statement equated the *Dairy Queen* decision with *Beacon Theatres* in this regard.

For similar reasons, there is no conflict among the circuits warranting the Court's intervention. The only circuit decision cited in the petition as applying the "correct" rule is *GTE Sylvania, Inc. v. Continental T.V., Inc.*, 537 F.2d 980 (9th Cir. 1976), *aff'd on other grounds sub nom Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977). That decision cannot create such a conflict because it is pre-*Parklane* and because of its particular, distinctive facts.

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[7] The district court cited "the complexity of this matter" in concluding that the court "possesses the discretion to proceed in this fashion"—that is, to try the ERISA remedial phase prior to the RICO claims (Pet. App. A-18).

CONCLUSION

For the reasons stated above, the petition for writ of certiorari should be denied.

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No. 87-911

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Racketeering Influenced Corrupt Organizations Act, 18 U.S.C. §§ 1961 *et seq.* 1, 2

Facts Common to Both the ERISA and RICO Claims Remain to be Tried in this Action.

The Continental Group, Inc. is filing this reply to clarify an erroneous characterization of the triable issues below that has been made by the respondents. In their opposition, they assert that "as to the ERISA claim, all that remained was for the trial court to fashion appropriate equitable relief for the class consisting of more than 2,000 individuals." Opposition to Petition for *Certiorari* at 6. They also state that the petitioners "concede that all that remains on plaintiffs' ERISA claims is fashioning the equitable relief which will remedy that violation." *Id.* at 7. These statements erroneously imply that there are no issues of fact common to the Employee Retirement Income Security Act of 1974 (29 U.S.C. §§1001 *et seq.*, "ERISA") and Racketeering Influenced Corrupt Organizations Act (18 U.S.C. §§1961 *et seq.*, "RICO") claims in the action that remain to be tried.

In the trial court order that gave rise to the Petition for Mandamus to the Third Circuit whose action in denying the Petition Continental has asked this Court to review, the court identified four qualifications that must be established in order for a plaintiff to qualify for recovery and then said: "[e]ach person as to whom the said four elements (or any modifications thereof which the court may determine) are established shall be entitled to be made whole under Section 510 of ERISA, 29 U.S.C.A. §1140, for any loss or injury sustained . . . unless the defendants shall establish that, even in the absence of Continental's illegal liability avoidance plan (or program), that person would have been without work at the same time in any event." Petition Appendix at A-3.

Following entry of the order, the plaintiffs moved for summary judgment as to 55 of the more than 2,500 alleged class members. In its October 15, 1987 opinion denying summary judgment, the court found that not all of the 55 had met their burden as to showing that they met the four criteria and confirmed that "a genuine issue of material fact exists as to whether the subject plaintiffs 'would have suffered the same loss of work even in the absence of the illegal plan.' " Petition Appendix at A-12. Thus remaining to be determined are the questions of whether the vast majority of the alleged class members can establish that they meet all four of the criteria and whether any of the plaintiffs will be entitled to recovery because they would have been laid off even absent any improper motivation for their layoffs.

The fact that these issues remain to be tried is confirmed by the March 7, 1988, order of the trial court (the order is included as the appendix hereto). In the order, the court indicates that the ability of the plaintiffs to establish that they meet the four *Gavalik* criteria is still at issue (at A-2), that Continental's "same loss" defense is still at issue (at A-2). The order also schedules trial of these issues for an initial group of claimants on October 3, 1988 (at A-3).

As discussed in the Petition at 4, both the ERISA and RICO counts of the second amended complaint arise from assertions that plaintiffs were harmed by the alleged unlawful conduct of the defendants. If the plaintiffs are unable to establish for the trier of fact that they meet the four eligibility criteria or if Continental is able to demonstrate that the actions alleged to have harmed the plaintiffs would have been taken even absent any improper motivation, then the respondents will have no basis for recovery of damages under either ERISA or RICO. Such a demonstration would defeat recovery under the pertinent section of ERISA (29 U.S.C. §1132(a)(3)(B), which allows a party to obtain "other appropriate equitable relief" to redress ERISA violations including a violation of the requirements of §1140 prohibiting pension-based discrimination) and under the pertinent section of RICO (18 U.S.C. §1964(c), which allows "any person injured in his business or property by reason of a violation of section 1962" to sue in U.S. district court and recover treble damages).

Thus facts that go to the heart of both Continental's ERISA defenses and its RICO defenses remain to be determined. Under *Beacon Theatres, Inc. v. Westover,* 359 U.S. 500 (1959), as demonstrated in its Petition, Continental is entitled to have a jury trial precede any bench trial of the issues of fact which are common to both the RICO and ERISA causes of action; and the jury's findings of fact as to such issues would be binding on the court in any subsequent bench trial. Continental urges this Court to respond positively to its Petition by granting a writ of *certiorari* and re-affirming its constitutional right to a jury trial of common issues of fact in this action preceding any bench trial of such issues.

Dated March 10, 1988

Respectfully submitted,

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APPENDIX

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Cecil McLendon, Don Vandertulip, Jimmie Cartharn, Jr., and Konrad Trojniar, on their own and on behalf of all others similarly situated,

Plaintiffs,

v.

The Continental Group, Inc., a New York corporation incorporated in 1913; Continental Can Company, Inc., a Delaware corporation; The Continental Group, Inc., a New York corporation incorporated in 1982; and KMI Continental Inc., a New York corporation,

Defendants.

Civil No. 83-1340

ORDER

This matter having been opened to the court by plaintiffs' motion for clarification and by defendants' motion for entry of proposed order governing future procedures for continued litigation; and the court having considered the written submissions and having heard oral argument; and for the reasons expressed in the accompanying opinion,

IT IS this 7 day of March, 1988, hereby

ORDERED that paragraphs 6 and 9 of the January 7, 1988 order of the Hon. Ronald J. Hedges, U.S. Magistrate, is vacated, and it is further

ORDERED that Continental is granted leave to supplement its December 1, 1987 factual submission in the following respects:

(a) additional evidence from Continental's personnel files;

(b) testimony from Fed. R. Civ. P. 30(b)(6) depositions of Continental's present and former customers and competitors, scheduled or noticed prior to February 8, 1988;

(c) the 1973 Boston Consulting Group study provided to plaintiffs on December 30, 1987 and other documents relating to the 1973 study or diversification in the canning industry;

(d) expert's reports from (i) Dr. Paul Marshall; (ii) Dean Collin Blaydon; (iii) an industrial engineering expert.

And it is further

ORDERED that plaintiffs, within 10 days of receipt of this order, shall submit a list of the 5 plants containing the greatest number of alleged class members, and it is further

ORDERED that, by April 30, 1988, plaintiffs shall explain clearly and fully, for each class member of the five selected plants, the basis for that class member's satisfaction of the four *Gavalik* criteria. Plaintiffs shall specify any documentary and testimonial evidence upon which they may rely in support of their contentions. As to *Gavalik* criteria, the parties shall file any motions pursuant to Rule 56 by May 13, 1988, with a return date of June 13, 1988. And it is further

ORDERED that, by June 15, 1988 (or within 30 days of the court's rulings on any Rule 56 motions concerning the initial *Gavalik* criteria), plaintiffs shall explain clearly and fully, for each class member at the five selected plants against whom Continental asserts a "same loss" defense, that class member's basis for opposing that defense. Plaintiffs shall specify any documentary and testimonial evidence upon which they may rely in support of their contentions. As to Continental's "same loss" defense, the parties shall file any motions pursuant to Rule 56 by June 24, 1988, with a return date of July 25, 1988. And it is further

ORDERED that discovery shall continue according to the orders of the magistrate. On August 1, 1988, each party will be permitted to make supplementary factual submissions as to the first plant selected for trial (the plant containing the most alleged class members). Such submissions shall be based only upon evidence received in discovery subsequent to prior factual submissions. Any other supplemental submissions by either party may be made only by consent of opposing counsel or with leave of court upon a showing of good cause. And it is further

ORDERED that, by September 15, 1988, the parties shall submit proposed findings of fact and conclusions of law as to the first plant identified for trial. And it is further

ORDERED that trial as to the first selected plant will commence on October 3, 1988. And it is further

ORDERED that provisions for supplementary factual submissions and trial as to the additional four plants initially selected will be established by future orders of the court.

/s/ H. LEE SAROKIN
H. LEE SAROKIN, U.S.D.J.